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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC., and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the Rules on Containers, even though they attempt to assign to ILA members work performed by motor carrier and warehouse employees which was not diverted from the piers by the container innovation, are primary and lawful based on the view that an agreement cannot have an illegal work acquisition object unless the agreement's implementation has the effect of actually transferring the work sought from non-unit employees to unit employees.

PARTIES BELOW

The judgment of the court of appeals upon which review is sought was rendered in four consolidated cases.[1] The International Brotherhood of Teamsters, which is petitioning separately, was a party in two cases below (Nos. 83-1185(L) and 83-1486). Although separate petitions are being filed, for the Court's convenience, a Joint Appendix has been developed by American Trucking Associations, Inc. and Tidewater Motor Truck Association, the International Brotherhood of Teamsters, the American Warehousemen's Association and the International Association of NVOCCs. References to that Appendix will be designated below as A. ——.

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[1] Other parties in the consolidated cases (Case Nos. 83-1185(L), 83-1214, 83-1424 and 83-1486) include: American Trucking Associations, Inc. and Tidewater Motor Truck Association; International Association of NVOCCS; American Warehousemen's Association; Houff Transfer, Inc.; National Labor Relations Board; International Longshoremen's Association, AFL-CIO; New York Shipping Association, Inc.; Council of North Atlantic Shipping Associations; Florida Custom Brokers and Forwarders Association, Inc.; Twin Express, Inc.; International Container Express, Inc.; San Juan Freight Forwarders, Inc.; Chester, Blackburn & Roder, Inc.; Eagle, Inc.; Eller & Company, Inc.; Harrington & Company, Inc.; Strachen Shipping Company and Marine Terminals, Inc.; Coordinated Caribbean Transport, Inc.; International Longshoremen's Association, Locals 333, 846, 862, 921, 953, 970, 1248, 1355, 1416, 1416-A, 1429, 1458, 1526, 1526-A, 1624, 1680, 1736, 1783, 1784, 1819, 1840, 1922 and 1970, AFL-CIO; International Longshoremen's Association, Atlantic Coast District Council, AFL-CIO; International Longshoremen's District Council, Baltimore, Maryland; International Longshoremen's Association, Hampton Roads District Council, AFL-CIO; Hampton Roads Shipping Association; and Southeast Florida Employers Port Association.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The International Brotherhood of Teamsters petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in these cases (Nos. 83-1185(L); 83-1486) on May 9, 1984.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Fourth Circuit is officially reported at 734 F.2d 966; it is set forth in full in the Joint Appendix accompanying this petition for certiorari (A. 1a) and is unofficially reported at 116 L.R.R.M. 2311. The decision and order of the National Labor Relations Board (A.

35a) on which this review proceeding and enforcement action are based is officially reported at 266 N.L.R.B. 230, and is unofficially reported at 112 L.R.R.M. 1305.

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on May 9, 1984 (A. 1a). Timely petitions for rehearing and suggestions for rehearing *en banc* were filed; they were later denied on July 31, 1984, with three judges voting to rehear the cases *en banc* (A. 31a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Labor Management Relations Act of 1947 ("LMRA"), §§ 8(b)(4), 8(e), 29 U.S.C. §§ 158(b)(4), 158(e), are as follows:

Section 8(b), 29 U.S.C. § 158(b), provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> 4(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is:
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful . . . any primary strike, or primary picketing; . . .

Section 8(e), 29 U.S.C. § 158(e), provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby

such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . .

STATEMENT OF THE CASE

Factual Statement

The procedural history of this proceeding is complex.[1] Essentially, it encompasses nine NLRB cases challenging the legality of the Rules on Containers under the hot cargo and secondary boycott prohibitions of the LMRA. 29 U.S.C. § 158(b)(4), (e). The Rules are contained in collective bargaining agreements between the International Longshoremen's Association and various employer associations representing sea carriers and stevedoring

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[1] The cases involved in this proceeding, with their subsequent histories, are as follows: *Dolphin Forwarding, Inc.*, 236 N.L.R.B. 525 (1978), *enforcement denied and remanded*, 613 F.2d 890 (D.C. Cir. 1979), *aff'd.*, 447 U.S. 490 (1980); *Associated Transport, Inc.*, 231 N.L.R.B. 351 (1977), *enforcement denied and remanded*, 613 F.2d 890 (D.C. Cir. 1979), *aff'd.*, 447 U.S. 490 (1980); *Consolidated Express, Inc.*, 221 N.L.R.B. 956 (1975), *enforced*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977), *mandate recalled and remanded*, No. 75-4266, 2d Cir., Oct. 1, 1980; *Puerto Rico Marine Management, Inc.*, 245 N.L.R.B. 1320 (1979), *remanded*, No. ——, 5th Cir., (unreported); *Beck Arabia, Ltd.*, 245 N.L.R.B. 1325 (1979), *remanded*, No. 79-1672, 4th Cir., Dec. 24, 1980; *Terminal Corp.*, 250 N.L.R.B. 8 (1980) (reconsideration granted *sua sponte*); *Hill Creek Farms, Inc.*, Case Nos. 4-CC-1133, 4-CE-55 (then pending before NLRB); *Custom Brokers & Forwarders Ass'n. of Miami, Inc.*, Case No. 12-CE-30 (then pending before NLRB); *American Trucking Ass'n., Inc.*, Case Nos. 22-CC-806 to -808 and 22-CE-44 to -46 (complaint issued Feb. 10, 1981). On January 19 and February 18, 20, 1981, the NLRB issued orders consolidating the foregoing cases for hearing on the issues raised by this Court's decision in *NLRB* v. *Longshoremen's Ass'n.*, 447 U.S. 490.

concerns (A. 207a-239a).[2] This proceeding was begun after the Court, in *NLRB* v. *Longshoremen's Ass'n.*, 447 U.S. 490 (1980), faulted the Board's earlier work preservation analysis and remanded *Dolphin Forwarding* and *Associated Transport* for reconsideration. Other pending cases, including one that was newly filed by the Trucking Group, as well as one closed case that was reopened and remanded to the Board, were then consolidated with those remanded by this Court (A. 44a-45a).

Although the Rules on Containers have a lengthy history in waterfront labor relations,[3] it suffices to note here that they were developed as a result of the container innovation and emerged in the Shipping Group's 1968 collective bargaining agreement (A. 9a-10a). In 1974, the parties adopted the so-called "Dublin Amendment" that interpreted the Rules and strengthened their enforcement (A. 10a-11a). It also expanded the Rules' application to all containers stuffed and stripped within fifty miles of port areas by persons other than employees of the cargo's beneficial owner. As so interpreted and expanded, the Rules have been included in the Shipping Group's collective bargaining agreements since 1974 with minor variation (A. 47a; 207a-239a).

Among the changes in the Rules made by the Dublin Amendment were those dealing with the established practice of "shortstopping" full shippers' load ("FSL") containers. FSL containers hold goods owned by a single shipper or consignee.[4] Although destined for delivery in-

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[2] The Employers and Unions bound by the Rules will be referred to collectively as the "Shipping Group," while those challenging the Rules, including the Teamsters, will be referred to as the "Trucking Group."

[3] The Rules on Containers and their history have been described many times. See cases and authorities cited in note 1 *supra*.

[4] In contrast, less than container load ("LCL") containers are those in which goods belonging to more than one shipper or consignee are consolidated, and which have been subject to the Rules since 1967 (A. 84a).

tact to consignees, both export and import FSL containers often were stopped short of their ultimate destinations by truckers, and unloaded or loaded at trucking stations in port areas for reasons unique to surface transportation. Cargo is transferred off-pier between containers and over-the-road equipment by Teamsters to consolidate freight consigned to the same destination into trailers having a greater capacity than the largest container; to avoid deadhead runs with empty containers; to minimize per diem charges for containers; and to assure equipment compatibility (A. 132a-137a). These and other economic or safety-related reasons warranted the continuation of shortstopping after the container innovation. Under the Dublin Amendment, however, FSL containers from which cargo is discharged by persons other than the consignee's own employees within the fifty-mile zone are to be handled at a waterfront facility by deepsea ILA labor (A. 224a).

In 1975, the Rules were modified in their application to warehousing practices (A. 232a). Previously, FSL cargo could be stripped by non-ILA labor at public warehouses in port areas if normal storage fees for thirty days were paid and title remained with the beneficial owner of the cargo for that period (A. 226a). At the ILA's insistence, the warehouse exception was eliminated altogether for export cargo and narrowed for import cargo by requiring its actual storage for thirty days (A. 10a-11a). These modifications caused the Rules to cut more deeply into traditional practices followed by inland public warehouses. This is particularly true so far as the Rules apply to specialized warehousing services—e.g., inventorying, stockpiling and special processing of goods—never before performed at the piers (A. 141a, 144a n.58).

The shortstopping and specialized warehousing services that the Rules sought to capture and bring to the piers traditionally have been performed by Teamsters, as incidents of surface transportation, either before marine transportation began or after it ended. Unlike the work

performed by employees of some off-shore consolidators, shortstopping and specialized warehousing were not created by the container innovation and did not divert work from the piers to the detriment of longshoremen. In performing these surface transportation functions, which existed before containerization, Teamsters are not engaged in the functional equivalent of deepsea longshore work (A. 133a-135a).

Under the Rules, FSL containers are to be loaded or unloaded "only at a waterfront facility by deepsea ILA labor," even if the container is designated for a single consignee, so long as it is loaded or discharged within a fifty-mile radius of the port by persons other than the shipper's own employees. This requirement, of course, causes shippers and sea carriers to use truckers and warehousemen having facilities outside the fifty-mile radius, and to cease doing business with those inside the geographic areas covered by Rules, to avoid double handling of cargo (A. 294a-302a). It may also cause container handling incidental to surface transportation to be performed at the piers. Work is lost by inland employees in both situations.

Decision Of The NLRB

The Board adopted the findings and conclusions of Administrative Law Judge Harmatz with only two changes. First, it explicitly defined the work in controversy as "the initial loading and unloading of cargo within 50 miles of a port into and out of containers owned or leased by shipping lines having a collective-bargaining relationship with the ILA" (A. 57a-58a, 59a). Using this definition, the Board agreed that the Rules had an overall work preservation objective, and were lawfully applied to recapture traditional longshore work that had been diverted from the piers by containerization. Second, while agreeing that the Rules had an illegal work acquisition objective as applied to shortstopping and certain warehousing operations (A. 58a-

59a), the Board modified the Administrative Law Judge's rationale in finding these violations.

Administrative Law Judge Harmatz concluded that the Rules' application had an illegal objective because they "seek to compensate longshoremen for [job] losses at the expense of inland employees whose jobs did not derive from containerization . . ." (A. 123a). The Board thought it unnecessary to rely on these findings. Instead, it concluded that the Rules' application to shortstopping and specialized warehouse services violated § 8 (e) of the Act because "the duplicative work of the longshoremen, in handling cargo which is then rehandled by truckers and warehouses, no longer exists as a step in the cargo-handling process" due to the efficiency of the new container technology (A. 59a). So far as the Rules were applied to acquire work to replace that which had disappeared due to technological change, they were tainted with an illegal work acquisition objective.

Decision Of The Court Of Appeals

On cross petitions for review and enforcement, the Fourth Circuit Court of Appeals upheld the legality of the Rules on Containers in their entirety (A. 29a). It denied the Trucking Group's petition for review and the Board's petition for enforcement of its orders prohibiting the Rules' application to shortstopping and certain warehousing practices. The Shipping Group's petition for review was granted (A. 30a). Agreeing with the Board, the court of appeals held that the Rules represented a lawful exercise of the work preservation doctrine because they sought to preserve work traditionally performed by bargaining unit employees, and were addressed to the shipping employers who actually possessed the power to assign the work in question (A. 26a).

On the other hand, the lower court held that the Board erred as a matter of law by deciding that the Rules' application to shortstopping and specialized ware-

housing violated the Act's proscriptions against secondary activity. In the appellate court's view, the Board failed to support its conclusion that the Rules were unlawfully applied to acquire the work of trucking and warehouse employees by a finding that such off-pier work actually had been transferred to the piers to be performed by longshoremen. It thought that mere duplicative container handling at the piers would not affect employees of truckers and warehousemen, who would continue to do what they did prior to containerization (A. 27a-28a).

This petition seeks review of the decision below to the extent enforcement of the Board's order prohibiting the Rules' application to shortstopping and specialized warehouse practices was denied by the court of appeals (A. 30a; 60a-61a).

REASONS FOR GRANTING THE WRIT

1. The lower court has decided an important issue of federal labor law contrary to principles repeatedly announced by this Court. A violation of the Act's hot cargo prohibition, 29 U.S.C. § 158(e), is made out by a showing that an agreement between an employer and a labor organization requires the cessation, either partial or total, of business relationships and has a secondary objective. *National Woodwork Mfrs. Ass'n.* v. *NLRB*, 386 U.S. 612, 635 (1967). See also *NLRB* v. *Local 825, Operating Engineers*, 400 U.S. 297 (1971). An agreement that seeks to acquire new work is secondary and prohibited by § 8(e). *NLRB* v. *Enterprise Ass'n. of Pipefitters*, 429 U.S. 507, 529-30 (1977). *Pipefitters* explicitly rejected the notion that "workers may legally demand that their employer cease doing business with another company even if the union's object is to obtain new work so long as that work is for the benefit of . . . [unit] employees." *Id.* at 528-29 n.16.

In the instant case, the court of appeals held that the Board failed to support its conclusion that the Rules were unlawfully applied to acquire the work of trucking and warehouse employees by a specific finding that such off-pier work actually had been transferred to the piers to be performed by longshoremen. It said that under the Rules, "truckers and warehousemen do precisely what they did before the change in technology; the longshoremen have acquired none of that work" (A. 28a).[5] Thus, the court below introduced an entirely new element into traditional primary-secondary analysis, that is, a requirement that the object of acquiring new work through secondary pressure actually succeed.

This novel requirement is completely at odds with the established principle that the *object* of an agreement calling for the disruption of a business relationship, not its *effect*, is determinative of the agreement's validity. After all, the benefit to bargaining unit employees of acquiring new work cannot validate a secondary agreement. *Pipefitters*, 429 U.S. at 529-30. Similarly, the effect of a work preservation agreement on the employment opportunities of employees outside the bargaining unit is irrelevant to the agreement's validity. *Longshoremen*, 447 U.S. at 507 n.22. The benefit to bargaining

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[5] The court of appeals apparently believed that the Rules merely call for duplicative handling of containers, both at trucking stations or inland warehouses and also at the piers. This understanding, which we submit is faulty, is contradicted by undisputed record testimony that the Rules' enforcement will force all container handling in the surface transportation industry outside the 50-mile zone (A. 294a, 297a, 330a). Even the requirement of double handling restricts the right of motor carriers and inland warehousemen to do business in the normal way with shippers and sea carriers. Like the payment of fines levied by the ILA, it is simply an "injurious alternative" (due to the added transportation costs) to a complete cessation of business. *Id.* See *Teamsters Local 85 (Southern Pacific Transportation Co.)*, 199 N.L.R.B. 212, 215 (1972).

unit employees and the detriment to non-unit employees are simply effects of the conduct or agreement in question. Once an illegal work acquisition motive is demonstrated, as here, it is immaterial whether non-unit employees were actually deprived of their work.

The tactical object of the Rules and their maintenance is to acquire for longshoremen work traditionally performed by employees of motor carriers and specialty warehousemen in the context of surface transportation within the fifty-mile zone. The device for attaining this object is a contractual requirement calling for a considerable disruption of established business relationships which may take the form of a complete cessation of business (Rule 1(e), A. 225a), or various injurious alternatives involving the exaction of economic penalties [6] or loss of the work in question by inland employees.[7] The Rules' object to influence secondary employers, by itself, is sufficient to demonstrate their secondary aim. *National Woodwork*, 386 U.S. at 645. Full attainment of the secondary object is unnecessary to make out a § 8(e) violation.

2. The decision of the court of appeals is in conflict with *Longshoremen*, 447 U.S. 490. There, the Board was instructed:

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[6] One penalty would be a fine of $1,000 for each container handled in violation of the Rules payable by the sea carriers which would then seek reimbursement from the offending motor carrier or specialty warehousemen (A. 47a). Another penalty would be the added transportation costs caused by the double handling of FSL containers. See note 5 *supra*.

[7] To avoid the economic penalties described above, see note 6 *supra*, the sea carriers and stevedoring companies must do business with motor carriers which arrange for container handling incidental to surface transportation at the piers, or transport containers intact within the 50-mile zone. Necessarily, compliance with the Rules applicable to FSL containers will diminish work opportunities for inland employees (A. 295a; 298a-299a; 301a).

> "to look at how the contracting parties sought to preserve that work [traditional longshore work], to the extent possible, in the face of a massive technological change that largely eliminated the need for cargo handling at intermediate stages of the intermodal transportation of goods, and to evaluate the relationship between traditional longshore work and the work which the Rules attempt to assign to ILA members. . . ." [*Id.* at 509 (footnote omitted).]

The legal test is "whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere." *Id.* at 510 (footnote omitted).

After an exhaustive analysis, Administrative Law Judge Harmatz found that the FSL container work claimed by the Rules is not historically and functionally related to the traditional longshore work of loading and unloading ships. Rather, "it is work assumed for a different purpose, and in a different segment of the transportation industry. . . . [It] neither competes with maritime cargo handling nor amounts to a subterfuge to oust longshoremen of their traditional work. . . ." (A. 134a-135a). Without rejecting this factual finding, the Board chose to rely on "the fact that, because of the efficiency of the new technology, the duplicative work of the longshoremen, in handling cargo which is then rehandled by truckers and warehouses, no longer exists as a step in the cargo-handling process. . ." (A. 59a).

At the Board level, therefore, clear factual findings showed that one object of the Rules was to capture FSL container work that was not historically and functionally related to traditional longshore work in order to replace that which had disappeared altogether from the cargo-handling process due to the development of container technology. The finding that traditional longshore work had not been diverted from the piers to motor carrier

or warehouse employees by the containerization of cargo was an essential predicate for the Board's ultimate factual conclusion that the longshoremen's duplicative, pier-side work had disappeared. Admittedly, the Board's reasoning is less than crisp; yet its essence is apparent. A line was drawn between traditional unit work that had been diverted to non-unit employees by the new technology and work that had not been diverted but had disappeared entirely. The former work could be lawfully claimed by the Rules, but the ILA's attempt to replace the latter work with work performed by non-unit employees constituted illegal work acquisition.

In distinguishing between primary and secondary activities, it is sometimes necessary to draw lines "more nice than obvious." *Local 761, Electrical Workers* v. *NLRB*, 366 U.S. 667, 674 (1961). The court below, however, drew no lines at all. It rejected the Board's attempt to distinguish, for purposes of the work preservation doctrine, between traditional longshore work that had been diverted from the piers, thus becoming fairly claimable, and work that had not been diverted but was being claimed to replace work that had disappeared altogether. Indeed, the court below made no effort "to evaluate the relationship between traditional longshore work and the [container work involved in shortstopping or specialty warehousing] which the Rules attempt to assign to ILA members. . . ." *Longshoremen*, 447 U.S. at 509 (footnote omitted). Rather, it stated erroneously that the work claimed had not been transferred to the piers because inland employees had not lost it.

Previously, we have shown how far the lower court strayed from established primary-secondary analysis. Of equal importance is the realization that its decision is standardless. No restrictions whatever are recognized, except those contained in the Rules themselves. All container work is now claimable by the ILA whether or not it is the functional equivalent of traditional longshore work once performed at the piers. Under the decision of

the court of appeals, the apprehensions expressed by the dissent in *Longshoremen*, 447 U.S. at 527-28, have become a reality. And, the majority's conclusion that "the result [in this case] will depend on how closely the [shipping] parties have tailored their agreement to the objective of preserving the essence of traditional work patterns. . ." has been totally ignored. *Id.* at 510 n.24.

Review by this Court is warranted. Otherwise, the work of motor carrier and warehouse employees, which was not diverted from the piers, and which was never part of traditional maritime work patterns, will be acquired by longshoremen under the Rules' expansive sweep. As this Court has recognized, the permissible bounds of work preservation presents an "important question of federal labor law." *Longshoremen*, 447 U.S. at 493. The broad impact of the lower court's decision, affecting thousands of marine and surface transportation employees, as well as its potentially dispositive nature, demonstrates the particular importance of the work preservation issues presented here.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR ARGUMENT

84-677

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JOINT APPENDICES TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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* Although each of the petitioners is filing separately for review, and we understand that a separate case number will be assigned to each petition, the petitioners are grouped together for purposes of this Joint Appendix in two captions that reflect the alignment of interests among the various parties.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 83-1185 (L)

AMERICAN TRUCKING ASSOCIATIONS, INC. and TIDEWATER MOTOR TRUCK ASSOCIATION,

vs. *Petitioners,*

NATIONAL LABOR RELATIONS BOARD,

Respondent.

HOUFF TRANSFER,

Intervenor/R

NYSA, ILA and CONAS,

Intervenors/P

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Intervenor/P

AMERICAN WAREHOUSEMEN'S ASSOC.

Intervenor/P

No. 83-1214

INTERNATIONAL ASSOCIATION OF NVOCCs,

and

FLORIDA CUSTOMA BROKERS AND FORWARDERS ASSOCIATION, INC.

and

TWIN EXPRESS, INC.,

and

INTERNATIONAL CONTAINER EXPRESS, INC.

vs. *Petitioners,*

NATIONAL LABOR RELATIONS BOARD,

Respondent.

SAN JUAN FREIGHT FORWARDERS, INC.

Intervenor.

No. 83-1424

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, HAMPTON ROADS DISTRICT COUNCIL; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ATLANTIC COAST DISTRICT COUNCIL; ILA LOCALS 333, 846, 862, 921, 953, 970, 1248, 1355, 1429, 1458, 1624, 1736, 1783, 1784, 1819, 1840, and 1970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S DISTRICT COUNCIL, BALTIMORE, MARYLAND; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 953; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 333; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ATLANTIC COAST DISTRICT, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 333, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 953, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCALS 1416, 1416-A, 1680, 1526, 1526-A, and 1922, AFL-CIO; HAMPTON ROADS SHIPPING ASSOCIATION; SOUTHEAST FLORIDA EMPLOYERS PORT ASSOCIATION; COORDINATED CARIBBEAN TRANSPORT, INC.; CHESTER, BLACKBURN & RODER, INC.; EAGLE, INC.; ELLER & COMPANY, INC.; HARRINGTON & COMPANY, INC.; STRACHEN SHIPPING COMPANY AND MARINE TERMINALS, INC.,
Respondents.

No. 83-1486

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC., and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATION,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

HOUFF TRANSFER, INC.; THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA ("TEAMSTERS"); AMERICAN TRUCKING ASSOCIATIONS, INC. ("ATA") and TIDEWATER MOTOR TRUCK ASSOCIATION ("TMTA"),
Intervenors.

Appeals from the National Labor Relations Board

Argued: January 12, 1984 Decided: May 9, 1984

Before HALL and PHILLIPS, Circuit Judges; and MAX ROSENN, Senior Circuit Judge for the United States Court of Appeals for the Third Circuit, sitting by designation.

J. Alan Lips (Mark S. Sauter, Mark E. Lutz, Taft, Stettinius & Hollister on brief); Donato Caruso (C. P. Lambos, Nicholas G. Maglaras, Lambos, Flynn, Nyland & Giardino on brief); Ernest L. Mathews, Jr. (Thomas W. Gleason; Francis A. Scanlan, Deasey, Scanlan & Bender, Ltd.; Braden Vandeventer, Vandeventer; Black, Meredith

& Martin; Nelson J. Cooney, American Trucking Associations, Inc.; Paul M. Thompson, Christine H. Perdue, Hunton & Williams; Raymond P. deMember, Garson, deMember & Weiner; Mahlon G. Funk, Jr., Hirschler, Fleischer & Weinberg; William L. Auten, Blakeney, Alexander & Machen; Arthur Liberstein, P. C.; William H. Towle, Burke, Kerwin, Towle & Andrin; Roland P. Wilder, Jr., David J. Gzesh on brief) for Petitioners; Linda Dreeben, NLRB (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, Howard E. Perlstein, Patrick J. Szymanski, NLRB on brief) for Respondent.

ROSENN, Senior Circuit Judge:

This case, in which nine different proceedings of the National Labor Relations Board (the Board) have been consolidated after a remand by the United States Supreme Court, requires us to carefully examine the emergence and development of a technological breakthrough in the shipping industry known as containerization. In particular, we must decide whether the Rules on Containers, (the Rules) negotiated by the International Longshoremen's Association (ILA or Union) and various employer associations representing east coast shipping lines, violate the secondary boycott proscriptions of sections 8(e) and 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. §§ 158(e) and 158(b)(4)(B). The Board held that, with two exceptions, the Rules are lawful. We hold that the Rules are valid in all respects.

I.

Although the Supreme Court[1] has described the history of containerization, some of it must be reiterated

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[1] NLRB v. Int'l Longshoremen's Ass'n, 447 U.S. 490 (1980).

for an understanding of our decision. Prior to the advent of what has come to be termed "the container revolution," [2] the movement of ocean-borne cargo at the pier contained two distinct stages. Truckers first delivered loose ("break-bulk") cargo to the terminal at the head of the pier. Longshoremen employed by steamship or stevedoring companies then transferred the cargo piece by piece from the tailgate of the truck to the hold of the outgoing ship, checking it, sorting it, placing it on pallets, moving it by forklift to the side of the ship, and lifting it into the hold. This process worked in reverse with regard to incoming ships, with the longshoremen removing the cargo from the ship piece by piece and transporting it to the tailgate of the truck, from which point truckers would deliver it to intermediate warehouses for shipment to the ultimate consignee.

As might be expected, moving cargo in this break-bulk manner proved expensive and inefficieint. Following World War II, therefore, steamship carriers operating between New York and Puerto Rico began to carry cargo in small (8′x8′x8′) reusable wooden receptacles called "Conex" and "Dravo" boxes. Initially, these boxes—the forerunners of the modern container—were "stuffed" (loaded) and "stripped" (unloaded) exclusively at the pier by ILA labor. Later, however, steamship companies made them available to shippers and others for stuffing and stripping off-pier by non-ILA labor. By the mid-1950's, larger metal containers began to replace the wooden boxes. Then in 1957 an event of enormous importance to the development of the shipping industry occurred: the first "containership" took to the sea, de-

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[2] For excellent background into the historical development and practical consequences of containerization, *see* Ross, *Waterfront Labor Response to Technological Change: A Tale of Two Unions*, 21 Lab. L.J. 397 (1970); Schmeltzer and Peavy, *Prospects and Problems of the Container Revolution*, 1 J. Mar. L. & Comm. 203 (1970).

signed specifically to move containers that would ultimately range up to forty feet in length. Within a decade, steamship companies began using containerships in other American ports, and in the North Atlantic trade routes between New York and the principal ports of Western Europe. By the mid-1970's containerized cargo inevitably reached all across the globe.

From the early days of containerization, its advantages loomed large. The Supreme Court succinctly described them as follows:

> The use of containers is substantially more economical than traditional methods of handling ocean-borne cargo. Because cargo does not have to be handled and repacked as it moves from the warehouse by truck to the dock, into the vessel, then from the vessel to the dock and truck or rail to its destination, the costs of handling are significantly reduced. Expenses of separate export packaging, storage, losses from pilferage and breakage, and costs of insurance and processing cargo documents may also be decreased. Perhaps most significantly, a container ship can be loaded or unloaded in a fraction of the time required for a conventional ship. As a result, the unprofitable in-port time of each ship is reduced, and a smaller number of ships are needed to carry a given volume of cargo.

NLRB v. International Longshoremen's Ass'n, 474 U.S. at 494-95 (footnotes omitted). In short, no one has ever doubted that containerization has enabled ocean-borne cargo to be moved in a strikingly more economical fashion than it had traditionally been moved.

But the effects of the innovation have not been unequivocally favorable. As has been the case with most important technological changes, containerization has promoted efficiencies and economies but at the same time has wrought some dislocations and hardships. Although the productivity of longshoremen has dramatically in-

creased, the number of jobs and the quantum of work available to them has sharply declined. In the Port of New York alone, for instance, the record reveals that annual employment slipped from 43,000,000 man-hours in 1958 to less than 20,000,000 in 1977 while the annual volume of cargo shipped through the port doubled. The slippage in employment has been the genesis of a long and bitter dispute between the various parties affected in which they have sought to come to terms with the two-edged consequences of an important technological advance.

As early as 1958, containerization had begun to make inroads into traditional longshoremen work, and the ILA could sense the shadows of impending storms. Not surprisingly, therefore, the first of a host of disputes between various east coast shipping employer associations and the ILA arose at about this time, with the shipping industry insisting that containers be permitted to move on and off the pier without any restrictions. The ILA insisted just as vociferously that it had the right to dictate the conditions under which its members would move the containers. These preliminary skirmishes—including a grievance by the Union that resulted in an arbitration ruling[3] requiring the ILA to handle containers it had theretofore refused to handle—culminated in the first set of collective bargaining negotiations to address the problems wrought by containerization. These 1959 negotiations between the ILA and the New York Shipping Association (NYSA) opened with the Union demanding that all containers be stripped and stuffed at the pier by the longshoremen. The Shipping Association countered with equally inflexible demands. Ultimately, however, the parties carved out an agreement.

In the agreement, the ILA conceded that any member of NYSA "shall have the right to use any and all type[s]

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[3] See Ross, *supra* note 2, at 401.

of containers without restriction or stripping by the union." In return, NYSA made two important concessions. It agreed, first, to pay the ILA royalties on containers stripped or stuffed away from the pier by non-ILA labor. Second, NYSA agreed that

> Any work performed in connection with the loading and discharging of containers for employer members of NYSA which is performed in the Port of Greater New York whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at longshore rates.

Whatever the merits of the 1959 agreement, it produced little tranquility. Grievances, work stoppages, and wildcat strikes blanketed the rapidly developing container shipping industry for most of the next decade. At least in part, this strife-ridden state of affairs stemmed from the conspicuously different interpretations the parties placed on an arguably ambiguous portion of the 1959 agreement. The ILA claimed that it had agreed to permit the free movement over the pier of only those containers that were "full shippers' loads" (FSLs)—containers holding goods beneficially owned by only one shipper or consignee. With respect to consolidated loads (also called "less than trailer loads" (LTLs) or "less than container loads" (LCLs)), containers holding goods belonging to more than one shipper or consignee, the ILA contended that it had retained the right to have its members stuff and strip such containers at the pier. The Shipping Association, on the other hand, claimed that the agreement essentially left them free insofar as consolidated loads were concerned, provided they made royalty payments on those loads not handled by ILA labor. The unrest generated by this conflict in interpretation led NYSA to make this 1962 concession:

> Where an employer-member of NYSA supplies a container which is the property of such member, to a

consolidator for loading or discharging of cargo in the Port of Greater New York, it will be stipulated that such container must be loaded or unloaded by ILA at longshore rates.

Throughout the 1960's, containerization assumed an increasingly prominent role on the waterfront. By 1967 containerized cargo constituted 20 percent of all cargo handled in the Port of New York. That year also marked the introduction of the first containership into the important North Atlantic trade route, which had previously been served exclusively by conventional vessels. In short, it had become abundantly clear that containerization had become an integral part of the ocean-borne shipping industry.

For obvious strategic reasons, this realization prompted the ILA to assume a posture of strict intransigence. With contract negotiations looming ahead for the summer of 1968, the Union in July 1967 adopted a resolution demanding once again that *all* containers be stuffed and stripped by ILA labor. Compliance with such a demand, of course, would have defeated the entire purpose of the technological breakthrough, as the Union well understood. It nevertheless opened the subsequent negotiations on exactly that note. NYSA countered with the equally unrealistic demand that all existing restrictions on the free movement of containers be eliminated. A strike ensued, lasting 56 days in the Port of New York and about twice that long in other Atlantic and Gulf ports. Only the appointment of a presidential board of inquiry pursuant to the emergency provisions of the Taft-Hartley Act brought the parties back to the bargaining table.

Out of this less than promising atmosphere emerged the Rules of Containers. Though difficult to summarize with precision, the Rules essentially provided that if containers owned or leased by the shipping companies carrying consolidated loads were to be stuffed or stripped

within a radius of 50 miles of the local port area by anyone other than the employees of the beneficial owner of the cargo, that work must be performed at the piers by ILA labor. The Rules also contained a liquidated damages provision for any container handled in violation of the Rules, and required the shipping companies to pay a royalty on any container that passed over the pier intact. As a practical matter, the effect of the agreement preserved only about 20 percent of the containerized cargo to the longshoremen for stuffing and stripping, with the remaining 80 percent passing over the pier intact. In 1971 the ILA and the Council of North Atlantic Shipping Associations (CONASA), a new multi-employer bargaining association representing the steamship companies, renewed the 1968 Rules, increasing the liquidated damage provision to $1000 per container.

Despite the existence of the Rules, the ILA steadfastly maintained that the shipping companies continued to permit and even encourage violations of the Rules. The Union therefore threatened to invoke its contractual right to suspend the Rules, a euphemistic way of suggesting that the longshoremen might refuse to handle any container stripped or stuffed inland. To mollify the Union, the parties met in Dublin, Ireland in January 1973 and executed an "interpretive bulletin" to the Rules designed to ensure their effective enforcement. In fact, however, the "Dublin Supplement"—as the agreement came to be called—accomplished a good deal more than merely the strengthening of enforcement mechanisms. In particular, the Supplement declared that the Rules applied to all containers—including FSL containers—that were stuffed or stripped within 50 miles of the port area by other than the beneficial owner's employees. This brought within the ambit of the Rules FSL containers that, although destined for delivery intact to their consignees, were stopped short of their ultimate destinations and stripped at warehouses

or trucking stations within the local port area. This prohibition on "shortstopping," as the practice came to be known, signified that such FSL containers lose their designation as such when shortstopped and become much more like consolidated loads, thereby triggering the ILA's right to perform such work at the pier. The parties nevertheless agreed to except from the restrictions on shortstopping any FSL containers that would be warehoused within the 50 mile port area for a minimum of 30 days.

At the conclusion of their 1974 negotiations, the parties agreed to retain the Rules as interpreted by the Dublin Supplement. The ILA continued to express indignation, however, at what it claimed to be recurring violations of the Rules by the shipping companies. In April 1975, the Union's indigation led it to suspend the Rules, and longshoremen stripped at the pier all containers except the FSLs. After a month, however, the parties settled the dispute by eliminating the 30 day warehouse exception insofar as it applied to export cargo and tightening it with regard to import cargo. In 1977, the parties again agreed to retain the Rules.

To summarize, the Rules now provide that if containers owned or leased by the shipping companies are to be stuffed or stripped within the local port area, that is, within a radius of 50 miles of the pier, by anyone other than the employees of the beneficial owner of the cargo, that work must be performed at the pier by ILA labor. Consolidated container loads coming from or bound for points outside the 50 mile area need not be stuffed or stripped by the longshoremen. FSL containers that are transported intact to or from the beneficial owner or any inbound FSL warehoused within the 50 mile area for at least 30 days likewise need not be stuffed or stripped by ILA labor.

II.

A.

Since 1970, the legitimacy of the Rules has been the subject of an extraordinary amount of litigation. Opponents first endeavored to challenge the Rules by contending that their enforcement violated the antitrust laws. The Second Circuit rejected the claim, however, concluding that the Rules came under the labor exemption. *Intercontinental Container Transport Corp. v. New York Shipping Ass'n*, 426 F.2d 884 (1970).

Opponents then began a prolonged attack on the Rules as violative of sections 8(e) and 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. §§ 158(e) and 158(b)(4)(B).[4] Between 1973 and 1979, the Board's General Counsel issued numerous unfair labor practice complaints, alleging in each instance that the Rules and their enforcement constituted impermissible secondary

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[4] Section 8(e) provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void . . . .

Section 8(b)(4)(B) provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is—forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . . *Provided*, That nothing contained in this clause . . . shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . .

activity. Federal courts thereupon enjoined enforcement of the Rules in numerous ports up and down the east coast pending final disposition of the charges.[5]

In its first consideration of the matter, *Consolidated Express, Inc.*, 221 N.L.R.B. 956 (1975), *enforced*, 537 F.2d 706 (2d Cir. 1976), *cert. denied* 429 U.S. 1041 (1977), *vacated and remanded*, No. 75-4266 (2d Cir. Oct. 1, 1980) (*Conex*), the Board held against the ILA and NYSA, concluding that the Rules and their enforcement—at least insofar as applied to off-pier consolidators—violated the Act's proscriptions against secondary activity. In so concluding, the Board recognized that the resolution of the issue turned on whether the Rules and their enforcement were designed to *preserve* longshore work for ILA employees or rather to *acquire* work traditionally performed by others, 221 N.L.R.B. at 959, and that the answer to that question in turn depended upon the precise definition of the work in controversy. *Id.* The Board proceeded to define the work in controversy as the off-pier consolidation into containers of LCL/LTL cargo. Almost by definition, of course, such work had never been performed by ILA labor. The Board therefore concluded that the Rules and their enforcement violated the Act.

A divided panel of the Second Circuit enforced the Board's order. 537 F.2d 706. Judge Feinberg, dissenting, contended that the Board's decision rested upon "a fundamental error": the work in controversy, he argued, must be viewed not from the perspective of the intervening complaining parties (there, off-pier consolidators) but from the perspective of the pre-agreement work of the

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[5] Balicer v. Int'l Longshoremen's Ass'n, 364 F.Supp. 205 (D.N.J. 1973), *aff'd without opinion*, 491 F.2d 748 (3d Cir. 1973) (Port of New York); Humphrey v. Int'l Longshoremen's Ass'n, 548 F.2d 494 (4th Cir. 1977) (Hampton Roads); Humphrey v. Int'l Longshoremen's Ass'n, No. Y-75-1395 (D. Md. March 25, 1976) (Baltimore); Hirsch v. Int'l Longshoremen's Ass'n, No. 79-2022 (E.D. Pa. June 12, 1979) (Philadelphia).

bargaining unit employees, the longshoremen. 537 F.2d at 712-14. For only by a careful examination of what longshoremen did prior to containerization, Judge Feinberg reasoned, can we determine whether the Rules seek to preserve that work. When the United States Supreme Court ultimately addressed the troublesome issues wrought by containerization, it adopted *sub silentio* the persuasive analytical framework set forth by Judge Feinberg. *NLRB v. International Longshoremen's Ass'n*, 447 U.S. 490, 503-13 (1980).

Before the Supreme Court considered the issue, however, the Board relied on *Conex* to adhere to its view that the Rules and their enforcement violated the Act. *See, e.g., International Longshoremen's Ass'n (Associated Transport, Inc.)*, 231 N.L.R.B. 351 (1977); *International Longshoremen's Ass'n (Dolphin Forwarding, Inc.)*, 236 N.L.R.B. 525 (1978); *International Longshoremen's Ass'n (Beck Arabia, Ltd.)*, 245 N.L.R.B. 1325 (1979); *International Longshoremen's Ass'n (The Terminal Corporation)*, 250 N.L.R.B. 8 (1980). Courts of appeals likewise leaned heavily on the Second Circuit decision in *Conex* to reach their conclusions that the Rules and their enforcement could not stand. *See International Longshoremen's Ass'n Local 1575 v. NLRB*, 560 F.2d 439 (1st Cir. 1977); *cf. Humphrey v. International Longshoremen's Ass'n*, 548 F.2d 494 (4th Cir. 1977).

In 1979, however, a divided panel of the District of Columbia Circuit denied enforcement of the Board's orders in both *Associated Transport* and *Dolphin Forwarding*, concluding that the Board had erred in defining the work in controversy. The court noted that the Rules "represent a reasoned response to the difficult problem of technological innovation" and "seek neither to stymie technological innovation nor to introduce manual labor in situations where the work otherwise would be handled by more efficient mechanized means." *International Longshoremen's Ass'n v. NLRB*, 613 F.2d 890, 914 (D.C. Cir.

1979). Because of the conflict among the circuits, the Supreme Court granted certiorari to help resolve the difficult legal problems containerization had engendered. 444 U.S. 1042 (1980).

B.

In *NLRB v. International Longshoremen's Ass'n*, 447 U.S. 490 (1980), a sharply divided Supreme Court affirmed the District of Columbia Circuit, holding that the Board's definition of the work in controversy "reflect[ed] a fundamental misconception of the work preservation doctrine" and was therefore "erroneous as a matter of law." *Id.* at 507, 511 n.26. Accordingly, the Court remanded *Dolphin Forwarding* and *Associated Transport* to the Board with instructions to reconsider the unfair labor practice complaints in light of the principles set forth by the Court. Because the Court's discussion provides the guidelines within which we must operate, a more detailed examination of the decision will be instructive.

The Court began its discussion with an account of the historical development of containerization, the tensions created by the innovation, and the accommodations ultimately reached by labor and management to reconcile their differences. *Id.* at 493-503. It then turned the inquiry to sections 8(b)(4)(B) and 8(e) of the Act and their prohibitions on secondary activity. This required the Court to synthesize two of its previous decisions, *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612 (1967), and *NLRB v. Enterprise Ass'n of Pipefitters*, 429 U.S. 507 (1977).

In *National Woodwork*, a collective bargaining agreement between a carpenter's union and a general contractor's association provided that union members would not handle any doors that had been pre-fitted, i.e., prepared for installation prior to shipment to the jobsite. A general contractor subject to the agreement initially or-

dered the pre-fitted doors, but returned them when the union instructed its members not to handle them. Opponents of the "will not handle" contract provision filed charges against the union, contending that the provision violated sections 8(e) and 8(b)(4)(B). The Board dismissed the charges, 149 N.L.R.B. 646 (1964), but the Court of Appeals for the Seventh Circuit reversed. 354 F.2d 594 (7th Cir. 1965). In reversing the Seventh Circuit, the Supreme Court stated:

> The determination whether the "will not handle" sentence . . . and its enforcement violated § 8(e) and 8(b)(4)(B) cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for . . . employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees.

386 U.S. at 644-45 (footnote omitted). Because the Board found that the task of cutting and fitting doors had traditionally been performed by carpenters at the jobsite, the Court concluded that the agreement and its enforcement constituted work preservation and therefore did not fall within the evil Congress intended to prevent when it enacted sections 8(b)(4)(B) and 8(e).

Ten years after *National Woodwork*, the Court refined the work preservation doctrine. In *Pipefitters*, a subcontractor on a construction job had a pre-existing collective bargaining agreement with its steamfitting employees under which all pipe threading and cutting would be performed on the jobsite by the steamfittters, who traditionally performed such work. Despite this agreement, the general contractor (with whom the union had no contract) specified that the pipes installed for this job were

to be threaded and cut prior to their shipment to the jobsite, and the subcontractor agreed. When the units arrived, the steamfitters refused to install them. As a result, the general contractor filed an unfair labor practice charge, claiming that the union sought to prevent the subcontractor from doing business with it. The Board agreed with the general contractor that the union's enforcement of the agreement violated section 8(b)(4)(B), concluding that although the collective bargaining agreement itself constituted a legitimate exercise of the work preservation doctrine, the effort to enforce it in a situation in which the coerced employer lacked the right to control the award of the work transformed the activity from primary (and thus permissible) to secondary (and thus impermissible). 204 N.L.R.B. 760 (1973).

A divided Court of Appeals for the District of Columbia Circuit, sitting en banc, set aside the Board's order, 521 F.2d 885 (1975), concluding that it violated the spirit of *National Woodwork*. The Supreme Court reversed, agreeing with the Board that the mere existence of a collective bargining agreement that withstands analysis under section 8(e) does not immunize secondary activity otherwise proscribed by section 8(b)(4)(B). Because the Court concluded that there existed substantial evidence on the record to support the Board's determination that the union exerted pressure on the subcontractor in order to influence the general contractor, it held that the court of appeals had overstepped its bounds in substituting its assessment of wise labor policy for that of the Board.

Having examined *National Woodwork* and *Pipefitters*, the *ILA* Court concluded:

> [A] lawful work preservation agreement must pass two tests: First, it must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the con-

> tracting employer must have the power to give the employees the work in question—the so-called "right of control" test . . . .

447 U.S. at 504.

The Court proceeded to explain how such a test should be applied in the case at hand, admitting that the threshold question—"[w]hat is the 'work' that the agreement allegedly seeks to preserve?"—posed a significantly more troublesome problem than had been the case in *National Woodwork* or *Pipefitters*:

> Identification of the work at issue in a complex case of technological displacement requires a careful analysis of the traditional work patterns that the parties are allegedly seeking to preserve, and of how the agreement seeks to accomplish that result under the changed circumstances created by the technological advance. The analysis must take into account "all the surrounding circumstances," *National Woodwork*, 386 U.S. at 644, including the nature of the work both before and after the innovation. . . . Whatever its scope, however, the inquiry must be carefully focused: to determine whether an agreement seeks no more than to preserve the work of bargaining unit members, *the Board must focus on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work*, and examine the relationship between the work as it existed before the innovation and as the agreement proposes to preserve it.

Id. at 507 (emphasis added) (footnote omitted).

The Court made clear, however, that the Board must do more than merely improve its definition of the work in controversy:

> The next step is to look at how the contracting parties sought to preserve that work, to the extent

> possible, in the face of a massive technological change that largely eliminated the need for cargo handling at intermediate stages of the intermodal transportation of goods, and to evaluate the relationship between traditional longshore work and the work which the Rules attempt to assign to ILA members. . . . *The legality of the agreement turns, as an initial matter, on whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere.*

Id. at 509-10 (emphasis added) (footnotes omitted).

Finally, the Court reminded the Board that it need address the "right of control" issue only if it first finds that the Rules have a lawful work preservation objective. *Id.* at 512.[6]

C.

On remand, Administrative Law Judge (ALJ) Joel A. Harmatz made an exhaustive analysis of the record and the applicable law. His detailed findings amply demonstrate that the work the longshoremen sought to claim under the Rules meets the Supreme Court's test of being "historical[ly] and functional[ly] relat[ed]" to their traditional, pre-containerization work. In addition, the ALJ carefully considered the argument of opponents of

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[6] Pursuant to the remand, the Second Circuit recalled its mandate in *Conex* and remanded the case to the Board. No. 75-4266 (Oct. 1, 1980). The Fourth Circuit likewise remanded *Beck Arabia* and the Fifth Circuit did the same with *Puerto Rico Marine Management*. The Board decided *sua sponte* to reconsider its decision in *Terminal*. At the time of the remand, it had not yet rendered decisions in *Hill Creek Farms* or *Custom Brokers*. On January 18, 1981, the Board consolidated the eight cases. On February 18, it remanded them to an administrative law judge for a hearing and decision on issues raised by the Supreme Court. Because a new complaint issued in *American Trucking* on February 10, the Board on February 20 ordered that case consolidated with the other eight.

the Rules that the Rules lacked a work preservation objective because containerization had created an entirely new intermodal transportation system that rendered obsolete the traditional ILA work of loading and unloading cargo by inseparately integrating that work into the services provided by others. He rejected the argument, finding that the loading and unloading of cargo has remained a distinctly independent task capable of being performed at a variety of locations. He likewise rejected the alternative contention that, on the basis of the 1959 agreement with NYSA, the longshoremen had abandoned any claim they might otherwise have had to the stuffing and stripping of containers.

The ALJ then turned to the other leg of the Court's two-part test, the "right of control" issue. He found that although the shipping companies release containers to shippers, importers, and their agents by virtue of contractual arrangements, the companies own or lease the containers and can therefore prescribe the conditions under which they may be released. He thus concluded that under such circumstances the "right of control" resides with the shipping companies, the parties to the Rules. The ALJ then rejected the "mischievous" contention that a Federal Maritime Commission decision, casting doubt on the legality of the Rules under the federal shipping laws, should play a role in the determination of whether the shipping companies lack the "right of control" for purposes of the National Labor Relations Act, concluding that each administrative agency should confine itself primarily to its own realm of expertise.

As our recapitulation of his analysis suggests, the ALJ found both that the work the ILA sought to retain under the Rules bore a "historical and functional relationship" to traditional longshore work *and* that the shipping lines had the right to control the stuffing and stripping of containers. This pair of findings might well have led him to conclude that, in light of the standard set out by the

Supreme Court, the Rules and their enforcement were in no way inconsistent with the Act. But the ALJ went one step further. Evidently believing that an otherwise valid work preservation agreement sheds its "preservative" identity and assumes an "acquisitive" one when applied "at the expense of" workers whose jobs existed prior to the development of the new technology, he concluded that the enforcement of the Rules violated the Act insofar as their enforcement sought to reach shortstopping by truckers and a narrow range of "traditional" warehouse practices. In so concluding, the ALJ made no finding that the longshoremen in fact "acquired" *anything* "at the expense of" *anyone*, i.e., that the stuffing and stripping of containers at the pier eliminates or diminishes work performed off-pier in these situations by truckers and warehousemen.

On the basis of his analysis, the ALJ recommended that the complaints in five cases—*American Trucking*, *Conex*, *Dolphin Forwarding*, *Puerto Rico Marine Management*, and *Hill Creek Farms*—be dismissed in their entirety and that the orders pending in three others —*Associated Transport* (shortstopping), *Beck Arabia* (warehousing), and *Terminal* (warehousing)—be modified to invalidate the Rules only insofar as they proscribe shortstopping and certain traditional warehouse practices.[7]

On February 28, 1983, the Board issued an order in which it adopted the findings, conclusions, and recommendations of the ALJ. In two respects, however, the Board "clarif[ied]" his decision.

First, the Board—observing that the ALJ had neglected to do so—set out an explicit definition of what it believed to be the work in controversy:

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[7] In *Custom Brokers*, the ALJ found an 8(e) violation that has not been challenged.

> [W]e find that the work in dispute is the initial loading and unloading of cargo within 50 miles of a port into and out of containers owned or leased by shipping lines having a collective-bargaining relationship with the ILA.

The Board then addressed that portion of the analysis in which the ALJ had concluded that, in two sets of circumstances, the Rules could not be sustained. Recognizing that the ALJ had committed a serious conceptual error in his approach, the Board divorced itself completely from this portion of the analysis:

> By focusing on the economic character of the trucking and warehousing industry and on the work historically performed by trucking and warehousing employees, the Administrative Law Judge's analysis appears to conflict with the Supreme Court's directions to us in its remand on this case. While the Supreme Court stated that our inquiry in this complex case would "require a broader view, taking into account the transformation of several interrelated industries or types of work . . .," the Court continued to emphasize that "the inquiry must be carefully focused . . . on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work . . . ." The Administrative Law Judge's findings give undue emphasis to the work historically performed by trucking and warehousing employees and to the fact that this work was not created by containerization. We find that the proper emphasis is on the traditional work of the longshoremen and what has happened to that work.

Despite its finding that the ALJ had improperly applied the pertinent law to the shortstopping and warehousing areas, the Board attempted to sustain his conclusion that the Rules violated the Act in these two areas on another ground. The Board stated that, with regard

to these two areas, the work that the longshoremen performed prior to containerization "no longer exists as a step in the cargo-handling process." Thus, on the basis of this finding that such work had been "eliminated," the Board concluded the ILA's attempt to preserve it through collective bargaining became tainted with "an illegal work acquisition objective." The Board reached this conclusion in the absence of any finding that the stuffing and stripping of containers at the pier eliminates or diminishes work performed off-pier in these situations by truckers and warehousemen.

Accordingly, the Board adopted the proposed order of the ALJ with regard to each of the nine cases before it. Pursuant to section 10(f) of the Act, 29 U.S.C. § 160(f), both the opponents of the Rules and the parties to the Rules have petitioned for review of those portions of the Board's order adverse to their interests. Pursuant to section 10(e) of the Act, 29 U.S.C. § 160(e), the Board has applied for enforcement of its order.

III.

As our narrative of the history of this dispute suggests, this case implicates important questions of law, economics, and public policy. It must be remembered, however, that fundamental principles of appellate review circumscribe the boundaries of our task. As to questions of fact, we may not disturb any finding of the Board that is supported by substantial evidence on the record as a whole. *Universal Camera Corp v. NLRB*, 340 U.S. 474, 487-88 (1951); *Virginia Electric & Power Co. v. NLRB*, 703 F.2d 79, 81 n.2 (4th Cir. 1983). We are, of course, obliged to correct any error of law made by the Board. *Allied Chemical & Alkali Workers Local v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166, 171-72 (1971); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947). With these principles firmly in mind, we turn to the issues before us.

A.

As previously discussed, the Supreme Court in *ILA* held that, to be a lawful exercise of the work preservation doctrine, a collective bargaining agreement must contain two elements. First, it must seek to preserve work traditionally performed by employees of the bargaining unit. Second, it must be addressed to an employer who actually has the power to assign the work in question. 447 U.S. at 504. The Board found that the Rules on Containers satisfy both requirements. We believe that substantial evidence exists in the record to support each of these factual findings.

Prior to the Court's decision in *ILA*, the Board (and most courts that faced the issue) consistently went awry by failing to grasp that the proper approach to the "work preservation objective" leg of the test entailed a comparison between the pre-containerization work of the longshoremen and the work they sought to claim under the Rules. Those few judges and members of the Board who managed to see this uniformly concluded that the Rules had a valid work preservation objective. *See, e.g., Conex*, 221 N.L.R.B. at 979 (1975) ((ALJ Arnold Ordman); *Conex*, 537 F.2d at 712-14 (2d Cir. 1976) (Feinberg, J., dissenting); *Humphrey v. International Longshoremen's Ass'n*, 401 F.Supp. 401 (E.D. Va. 1975) (Merhige, J.), *rev'd* 548 F.2d 494, 500-01 (4th Cir. 1977) (Craven, J., dissenting); *The Terminal Corporation*, 250 N.L.R.B. 8 (1980) (Chairman Fanning, dissenting); *Associated Transport*, 231 N.L.R.B. 351, 353-57 (1977) (Chairman Fanning, dissenting), *rev'd* 613 F.2d 890, 908-10 (D.C. Cir. 1979). In so concluding, these individuals recognized that which Judge Friendly, in another context, had incisively stated:

> Stripping a container of goods . . . is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship

> even though it is performed on shore and not in the ship's cargo holds.

Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 53 (2d Cir. 1976).

The Court set the matter straight in *ILA* by clearly instructing the Board to "focus on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work." 447 U.S. at 507. This the Board did. Not surprisingly, it had little trouble finding that "the work of loading and unloading containers claimed by the Rules is functionally related to the traditional loading and unloading work of the longshoremen." It therefore concluded that the Rules indeed had the objective of preserving the steadily dwindling volume of work when the ILA negotiated them. We believe the Board could not have concluded otherwise. Traditionally, longshoremen loaded cargo piece by piece into the hold of the ship and unloaded it piece by piece from the hold. The Rules grant them the right in certain instances to load cargo piece by piece into containers and unload it piece by piece from containers. In short, containerization has simply changed the locus of the work, moving the operation shoreward.

Up until the Court decided *ILA*, no one seriously contended that the Rules violated the Act for failure to meet the "right of control" test of *Pipefitters*. In part, of course, this reality stemmed from the success of opponents of the Rules in winning the battle on the basis of the Board's mistaken approach to the work preservation issue. We believe, however, that an additional explanation underlay the absence: the argument that the shipping lines do not have the right to control the container work sought by the longshoremen lacks any semblance of merit.

After the Supreme Court decided *ILA*, opponents of the Rules—correctly sensing that the very foundation of their work preservation argument had been cut out from

under them—constructed a sophisticated "right of control" argument that rested on a decision of the Federal Maritime Commission. *Sea-Land Service, Inc—Proposed Rules on Containers*, 21 F.M.C. 1 (1978), *aff'd in part and remanded in part sub nom. Council of North Atlantic Shipping Ass'ns v. FMC*, 672 F.2d 171 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 69 (1982), *on remand* Nos. 73-17 & 74-40 (FMC May 19, 1982), *vacated and remanded*, No. 78-1776, Supplemental Opinion Following Remand (D.C. Cir. July 2, 1982), *reh'g en banc denied*, No. 78-1776 (D.C. Cir. Sept. 23, 1982). Whatever appeal that argument may have commanded,—and the ALJ, after an exhaustive analysis, concluded that it commanded none—it has now become moot, for the decision on which it rested has been vacated. *Council of North Atlantic Shipping Ass'ns v. FMC*, No. 78-1776 (D.C. Cir. July 2, 1982) (per curiam).

As the Board found, the shipping companies invested their own capital in the development of the technology of containerization. They own or lease the containers. They prescribe the conditions under which they may be released to shippers, consolidators, truckers, and warehousement who might otherwise choose to utilize the containers so as to violate the Rules. In sum, the Board had little difficulty finding that the shipping lines retain the right to control the allocation of the work sought by the ILA under the Rules. Substantial evidence exists to support this finding.

B.

As noted above, despite its findings that the Rules embody a lawful work preservation objective and that the shipping companies retain the right to control the assignment of the work sought to be claimed, the Board went on to conclude that the enforcement of the Rules in two instances violates the Act's proscriptions against secondary activity. With regard to both shortstopping by truckers and some traditional warehousing functions, the

Board concluded that, because the Rules sought to preserve for the longshoremen work that had been rendered superfluous by the change in technology and not work that had been diverted to others, the effort to do so violates the Act. In so concluding we believe the Board erred as a matter of law.[8]

Prior to containerization, both the longshoremen and the truckers handled the break-bulk cargo as it moved from the ship to the consignee. Longshoremen would perform the initial unloading of the ship, moving the cargo piece by piece to the local seaport terminal. From there, truckers usually hauled the cargo to their own terminal or freight station, where they would reload it into their over-the-road equipment. With containerization, the off-pier work of the shortstopping truckers remains essentially unchanged except that they unload cargo from containers instead of from motor trucks. And with containerization, of course, the work formerly performed by the longshoremen has been rendered unnecessary because the container can be fastened to the chassis of a truck and transported intact to the trucking terminal or freight station.

From these unassailable facts, the Board concluded that the ILA's attempt to preserve under the Rules loading and unloading of cargo constitutes "unlawful work acquisition." But the Board conspicuously failed to ground this conclusion of law in the only finding of fact that might support it: that the Rules, in preserving for ILA members the right to do this initial loading and unloading, somehow deprive the truckers and warehousemen of *their* off-pier work by transferring all or some of it to longshoremen at the pier. Put another way, the Board hung the "work acquisition" tag on the Rules in these two

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[8] Because the Board made the identical error of law with regard to both shortstopping and warehousing, we will illustrate that mistake by using the shortstopping example only.

instances without a finding that the longshoremen acquired anything. Careful examination of the respective work patterns of longshoremen, truckers, and warehousemen reveals quite clearly why the Board failed to make this finding: the facts would not support it. Prior to containerization, truckers and warehousemen handled the cargo break-bulk; unloading of the cargo from the hold of the ship by the longshoremen obviously did not hinder these off-pier practices. Thus, one cannot possibly maintain that the stripping of import containers at the pier would in any way prevent the identical off-pier work. To repeat, truckers and warehousemen do precisely what they did before the change in technology; the longshoremen have acquired none of that work. Although the longshoremen's work in this process may well duplicate the off-pier work of truckers and warehousemen, calling this set of circumstances "work acquisition" strikes us as particularly inappropriate. And it is not our function as a court of review to weigh the economic cost of the Rules.

Were we writing on a clean slate, the work preservation doctrine implicitly espoused by the Board—that work rendered unnecessary by technological change may not be properly preserved in a collective bargaining agreement—might well meet with our approval. Nothing could be clearer, however, that we do not write on a clean slate. The Supreme Court in *National Woodwork* made absolutely clear that, in enacting sections 8(b)(4)(B) and 8(e), Congress did not intend to prohibit a collective bargaining agreement that has as its "sole objective the protection of union members from a diminution of work flowing from changes in technology." 386 U.S. at 648-50 (Harlan, J., concurring). Such an agreement, the Court held, constituted primary and therefore legitimate union activity. The Board's attempt to carve out a novel work preservation doctrine flies in the face of *National Woodwork.*

The Board itself seems to have recognized the problem with its analysis. At the end of its decision, it purported to anchor its "work acquisition" conclusion in a cursory reference to two cases that the ALJ, after a probing review, had found to be completely inapposite. *Carrier Conditioning Co. v. NLRB*, 547 F.2d 1178 (2d Cir. 1976), *cert. denied*, 431 U.S. 974 (1977); *Associated General Contractors v. NLRB*, 514 F.2d 433 (9th Cir. 1975). These "new product" cases stand for the proposition that a collective bargaining agreement violates the principles of *National Woodwork* when it seeks to claim work so different from that traditionally performed by the bargaining unit employees that it constitutes a "new product" and requires skills more sophisticated than can be offered by those who claim the work. In such cases, the objective takes on a secondary taint because the bargaining unit employees in reality seek to acquire the work performed by the employees of the manufacturer of the "new" product. Such a proposition, as the ALJ found, has no place in the containerization dispute.

In sum, we believe the Board misapplied the doctrine of work preservation in concluding that the Rules violate the Act insofar as they are applied to shortstopping and a narrow range of warehouse practices. We hold that the Rules are lawful in their entirety and may be enforced.

IV.

We noted above that this case raises troublesome questions of law, economics, and public policy. Surely the most troublesome question raised by this long-standing dispute concerns the matter of duplicative work. The Supreme Court has declared, first in *National Woodwork* and more recently in *ILA*, that in cases such as this the efficient use of resources may not serve as a guide to disposition because Congress has indicated that it ascribes greater value to the collective bargaining mechanism than to economic niceties. We well understand that our con-

clusion that the Rules on Containers do not violate the Act clears the way for longshoremen to do an entire range of work that arguably no longer serves any economic purpose. In the final analysis, however, our obligation is to apply the laws that Congress has given us, not to close our eyes to them.

The petitions for review in *American Trucking*, *Conex*, *Dolphin Forwarding*, *Puerto Rico Marine Management*, and *Hill Creek Farms* are denied. The application for enforcement in *Associated Transport*, *Beck Arabia*, and *Terminal* is denied and the petitions for review are granted. The application for enforcement in *Custom Brokers* is granted.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1185

[Filed Jul. 31, 1984]

AMERICAN TRUCKING ASSOCIATIONS, INC. and TIDEWATER MOTOR TRUCK ASSOCIATION,

versus *Petitioners,*

NATIONAL LABOR RELATIONS BOARD,
Respondent.

HOUFF TRANSFER,
Intervenor./R

NYSA, ILA and CONAS,
Intervenor./P

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Intervenor./P

AMERICAN WAREHOUSEMEN'S ASSOCIATION,
Intervenor./P

No. 83-1214

INTERNATIONAL ASSOCIATION OF NVOCCs, *and* FLORIDA CUSTOMS BROKERS AND FORWARDERS ASSOCIATION, INC., *and* TWIN EXPRESS, INC., *and* INTERNATIONAL CONTAINER EXPRESS, INC.,

versus *Petitioners,*

NATIONAL LABOR RELATIONS BOARD,
Respondent.

SAN JUAN FREIGHT FORWARDERS, INC.,
Intervenor.

No. 83-1424

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, HAMPTON ROADS DISTRICT COUNCIL; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ATLANTIC COAST DISTRICT COUNCIL; ILA LOCALS 333, 846, 862, 921, 953, 970, 1248, 1355, 1429, 1458, 1624, 1736, 1783, 1784, 1819, 1940, and 1970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S DISTRICT COUNCIL, BALTIMORE, MARYLAND; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 953; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 333; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ATLANTIC COAST DISTRICT, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 333, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 953, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCALS 1416, 1416-A, 1680, 1526, 1526-A, and 1922; AFL-CIO; HAMPTON ROADS SHIPPING ASSOCIATION; SOUTHEAST FLORIDA EMPLOYERS PORT ASSOCIATION; COORDINATED CARIBBEAN TRANSPORT, INC.; CHESTER, BLACKBURN & RODER, INC.; EAGLE, INC.; ELLER & COMPANY, INC.; HARRINGTON & COMPANY, INC.; STRACHEN SHIPPING COMPANY AND MARINE TERMINALS, INC.,
Respondents.

No. 83-1486

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC., and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,
Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

HOUFF TRANSFER, INC.; THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA ("TEAMSTERS"); AMERICAN TRUCKING ASSOCIATIONS, INC. ("ATA") and TIDEWATER MOTOR TRUCK ASSOCIATION ("TMTA"),
Intervenors.

ORDER

[Filed Jul. 31, 1984]

Petitions for rehearing and suggestions for rehearing in banc were submitted to this Court. In a requested poll of the Court, Judges Russell, Widener and Chapman voted to rehear the cases in banc; and Judges Winter, Hall, Phillips, Murnaghan, Sprouse and Ervin voted against rehearing the cases in banc. As a majority of the judges voted to deny rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips, with the concurrence of Judge Hall and Judge Rosenn, sitting by designation.

For the Court,

/s/ John M. Greacen
Clerk

APPENDIX C

266 NLRB No. 54

MZH
D-9736
New York, NY; Baltimore, MD
Jacksonville and Miami, FL
Philadelphia, PA
Mullica Hill, NJ

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 2-CC-1364,
2-CC-1365, and
2-CE-75

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

and

NEW YORK SHIPPING ASSOCIATION, INC.

and

DOLPHIN FORWARDING, INC.

and

SAN JUAN FREIGHT FOREWARDERS, INC.

Cases 5-CC-791,
5-CC-792,
5-CC-793,
5-CC-794,
5-CE-48,
5-CE-49,
5-CE-50, and
5-CE-51 [1]

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, *et al.*

and

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

and

HAMPTON ROADS SHIPPING ASSOCIATION

and

TIDEWATER MOTOR TRUCK ASSOCIATION

and

ASSOCIATED TRANSPORT, INC.

and

HOUFF TRANSFER, INC.

Cases 12-CC-1002 and
12-CC-1004

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
LOCAL 1408

and

PUERTO RICO MARINE MANAGEMENT, INC.

and

INTERNATIONAL CONTAINER EXPRESS, INC.

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[1] We have corrected the caption in this case to add the CE case numbers, which the Administrative Law Judge inadvertently omitted from the caption of his Decision.

Cases 22-CC-541,
22-CC-554,
22-CE-19, and
22-CE-20

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

and

NEW YORK SHIPPING ASSOCIATION, INC.

and

CONSOLIDATED EXPRESS, INC.

and

TWIN EXPRESS, INC.

Cases 5-CC-925 and
5-CC-929

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, *et al.*

and

THE TERMINAL CORPORATION

Cases 4-CC-1133 and
4-CE-55

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
LOCAL 1242

and

HILL CREEK FARMS, INC.

Case 12-CE-30

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1416, *et al.*

and

CUSTOM BROKERS AND FORWARDERS ASSOCIATION OF MIAMI, INC.

Case 5-CC-889

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1359, *et al.*

and

BECK ARABIA, LTD.

Cases 22-CE-44,
22-CE-45, and
22-CE-46

NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

and

AMERICAN TRUCKING ASSOCIATIONS, INC. and TWIN EXPRESS INC. and INTERNATIONAL ASSOCIATION OF NON-VESSEL OPERATING COMMON CARRIERS

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO (and its Affiliated Local Unions) and ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

and

WEST GULF MARITIME ASSOCIATION and SOUTHEAST FLORIDA EMPLOYERS PORT ASSOCIATION and MOBILE STEAMSHIP ASSOCIATION, INC. and SOUTH ATLANTIC AND GULF DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

Cases 22-CC-806,
22-CC-807, and
22-CC-808

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO (and its Affiliated Local Unions) and ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO (New York Shipping Association, Inc. and Council of North Atlantic Shipping Associations)

and

AMERICAN TRUCKING ASSOCIATIONS, INC. and TWIN EXPRESS, INC. and INTERNATIONAL ASSOCIATION OF NON-VESSEL OPERATING COMMON CARRIERS

Case 22-CE-47
(formerly 5-CE-67)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO (and its Affiliated Locals) and ATLANTIC COAST DISTRICT COUNCIL, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

and

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS AND STEAMSHIP TRADE ASSOCIATION OF BALTIMORE, INC. (and its Affiliated Members)

and

AMERICAN TRUCKING ASSOCIATIONS, INC.

Case 22-CE-48
(formerly 5-CE-68)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO (and its Affiliated Locals) and ATLANTIC COAST DISTRICT COUNCIL, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

and

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS and HAMPTON ROADS SHIPPING ASSOCIATIONS (and its Affiliated Members)

and

AMERICAN TRUCKING ASSOCIATIONS, INC.

Case 22-CC-809
(formerly 5-CC-984)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO (and its Affiliated Locals) and ATLANTIC COAST DISTRICT COUNCIL, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO (Steamship Trade Association of Baltimore, Inc.)

and

AMERICAN TRUCKING ASSOCIATIONS, INC.

Case 22-CC-810
(formerly 5-CC-985)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO (and its Affiliated Locals) and ATLANTIC COAST DISTRICT COUNCIL, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO and HAMPTON ROADS DISTRICT COUNCIL, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO (Hampton Roads Shipping Association)

and

AMERICAN TRUCKING ASSOCIATIONS, INC.

DECISION AND SUPPLEMENTAL DECISION AND ORDER

On September 29, 1981, Administrative Law Judge Joel A. Harmatz, issued the attached Decision in this proceeding. Thereafter, the following parties filed exceptions and supporting briefs: the General Counsel; Respondents International Longshoremen's Association, AFL-CIO, New York Shipping Association, Inc., and Council of North Atlantic Shipping Associations; Charging Parties San Juan Freight Forwarders, Inc., Tidewater Motor Truck Association, International Container Express, Inc., Consolidated Express, Inc., Twin Express, Inc., Hill Creek Farms, Inc., Custom Brokers and Forwarders Association of Miami, Inc., American Trucking Associations, Inc., and International Association of Non-Vessel Operating Common Carriers; and Intervenor American Warehousemen's Association. Respondent Southeast Florida Employers Port Association and Charging Party Houff Transfer, Inc., filed cross-exceptions and supporting briefs. Respondents International Longshoremen's Association, AFL-CIO, New York Shipping Association, Inc., and Council of North Atlantic Shipping Associations filed an answering brief to the exceptions of the General Counsel and to the exceptions and cross-exceptions of the various Charging Parties. The following Charging Parties filed answering briefs to the Respondents exceptions: Houff Transfer, Inc., Twin Express, Inc., Custom Brokers and Forwarders Association of Miami, Inc., American Trucking Associations, Inc., and International Association of Non-Vessel Operating Common Carriers. Charging Party Custom Brokers and Forwarders Association of Miami, Inc., also filed an answering brief to the exceptions of Respondent Southeast Florida Employers Port Association. In addition, Intervenor International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

Issue

The question presented in this case is whether the Rules on Containers negotiated by the International Longshoremen's Association (ILA) with the various employer associations representing east coast shipping lines in response to the technological innovation of containerized shipping are merely an attempt to preserve work historically performed by longshoremen represented by the ILA or instead are an effort to acquire for longshoremen represented by the ILA work which is not functionally related to their traditional work. If we resolve this issue by finding that the Rules, as written and as applied, have a valid work preservation objective, then they would not be unlawful "hot cargo" agreements under Section 8(e) nor would their enforcement be prohibited secondary activity under Section 8(b)(4)(B); however, insofar as particular Rules evidence the secondary objective of claiming work not traditionally performed by longshoremen, such Rules would be illegal under Section 8(e) and any attempt to enforce them would be illegal under Section 8(b)(4)(B).

History of the Case

This case, in which nine different underlying Board proceedings have been consolidated, arises out of the Supreme Court decision in *N.L.R.B.* v. *International Longshoremen's Association, AFL-CIO, et al.*, 447 U.S. 490

(1980), which remanded *Dolphin Forwarding*[2] and *Associated Transport*[3] to the Board for reconsideration of its earlier decisions finding that the Rules on Containers and their enforcement were illegal under Section 8(e) and Section 8(b)(4)(B) of the Act, as an attempt to acquire work which the union's members had never performed. The Supreme Court held that the Board's definition of the work in controversy, as originally set forth in its *Conex* decision,[4] was incorrect as a matter of law because it concentrated on the work performed off the piers after containerization by the employees of consolidators and truckers. The Supreme Court stated:

> By focusing on the work as performed after the innovation took place, by the employees who allegedly have displaced the longshoremen's work, the Board foreclosed—by definition—any possibility that the longshoremen could negotiate an agreement to permit them to continue to play any part in the loading or unloading of containerized cargo.[5]

Rather, the Supreme Court directed the Board to "focus on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work, and examine the relationship between the work as it existed before the innovation and as the agreement proposes to preserve it."[6] The Supreme Court noted that this analysis should "be informed by an aware-

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[2] *International Longshoremen's Association, et al. (Dolphin Forwarding, Inc.)*, 236 NLRB 525 (1978), enforcement denied 613 F.2d 890 (D.C. Cir. 1979).

[3] *International Longshoremen's Association, AFL-CIO, et al. (Associated Transport, Inc.)*, 231 NLRB 351 (1977), enforcement denied 613 F.2d 890 (D.C. Cir. 1979).

[4] *International Longshoremen's Association, AFL-CIO, et al. (Consolidated Express, Inc.)*, 221 NLRB 956 at 959 (1975), enfd. 537 F.2d 706 (2d Cir. 1976), cert. denied 429 U.S. 104 (1977).

[5] 447 U.S. at 508.

[6] 447 U.S. at 507.

ness of the congressional preference for collective bargaining as the method for resolving disputes over dislocations caused by the introduction of technological innovations in the workplace. . . ." [7] and stated further:

> Thus, in judging the legality of a thoroughly bargained and apparently reasonable accommodation to technological change, the question is not whether the Rules represent the most rational or efficient response to innovation, but whether they are a legally permissible effort to preserve jobs.[8]

As a result of the Supreme Court's remand in *Dolphin Forwarding* and *Associated Transport*, the Court of Appeals for the Second Circuit recalled its mandate in *Conex* and remanded that decision to the Board for reconsideration. In addition, the Courts of Appeals for the Fourth and Fifth Circuits, respectively, remanded the decisions in *Beck Arabia* [9] and *Puerto Rico Marine Management*,[10] which were pending before those courts, to the Board for reconsideration. Finally, the Board decided, *sua sponte*, to reconsider its decision in *Terminal Corporation*.[11] At the time of the Supreme Court remand, the Board had not yet rendered a decision in *Hill Creek Farms* [12] or *Custom Brokers*,[13] which were pending before it on exceptions to Administrative Law Judges' Decisions.

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[7] 447 U.S. at 511.

[8] *Id.*

[9] *International Longshoremen's Association, AFL-CIO, et al. (Beck Arabia, Ltd.)*, 245 NLRB 1325 (1979).

[10] *International Longshoremen's Association, AFL-CIO, Local Union No. 1408 (Puerto Rico Marine Management, Inc.)*, 245 NLRB 1320 (1979).

[11] *International Longshoremen's Association, AFL-CIO, et al. (The Terminal Corporation)*, 250 NLRB 8 (1980).

[12] *International Longshoremen's Association, Local 1242 (Hill Creek Farms, Inc.)*, Cases 4-CC-1133 and 4-CE-55.

[13] *International Longshoremen's Association, Local 1416, et al. (Custom Brokers and Forwarders Association of Miami, Inc.)*, Case 12-CE-30.

On January 19 and February 18, 1981, the Board issued orders consolidating the above eight cases and remanding them to an administrative law judge for a hearing and a decision on the issues raised by the Supreme Court remand. On February 10, 1981, a new complaint issued in *American Trucking Associations*,[14] and on February 20, 1981, the Board issued an order further consolidating the proceedings to include this complaint.

The Rules on Containers

The facts underlying the development of containerized shipping for ocean cargo from the 1950's to the 1970's and the evolution of the Rules on Containers negotiated by the ILA between 1959 and 1980 in response to the development of this new technology are summarized in the Supreme Court opinion[15] and set forth in great detail in the Administrative Law Judge's Decision in this case.[16] Briefly, a container is a large, reusable metal receptacle, which can be loaded with cargo away from the pier, transported intact to the dock, and placed onto an ocean vessel unopened. Conversely, a container can also be removed from an ocean vessel unopened and transported intact to a location away from the pier for unloading. The shipping lines financed the creation of this new technology, including the development of the actual containers and the specialized ships built to accommodate these particular containers. The shipping lines generally own the containers which are carried on board their vessels and will sometimes use their own employees represented by the ILA to load or unload cargo into or out of these con-

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[14] *International Longshoremen's Association, AFL-CIO, et al. (American Trucking Associations, Inc.)*, Cases 22-CC-806, 807, 808, 809, 810 and 22-CE-44, 45, 46, 47, 48.

[15] 447 U.S. at 494.

[16] See sec. III, D, of the Administrative Law Judge's Decision, sl. op., pp. 15—24.

tainers at the pier; however, the shipping lines release many of their containers to other companies for loading and unloading away from the pier. Containers are most often released to the following types of companies away from the pier: owners of cargo, which perform their own loading and unloading of containers in connection with ocean transport; consolidators, which load the cargo of several shippers into a single container for ocean transport; truckers, which perform local and over-the-road transportation of cargo before or after ocean transport as well as loading and unloading of both trucks and containers incidental to this transportation, but which may also function as consolidators or warehouses; and warehouses, which receive cargo for storage before or after ocean transport and perform loading and unloading of both trucks and containers in connection with the storage of cargo, but which may also function as consolidators or truckers.

Before containerized shipping developed, truckers delivered loose cargo to the pier, where longshoremen consolidated some cargo onto pallets and loaded the pallets and individual pieces of cargo on board the ship. Longshoremen also unloaded pallets and loose cargo from the ship to be picked up by truckers. Longshoremen often assisted the truckers in unloading and loading cargo out of and into trucks at the pier. The introduction of containerized shipping greatly reduced the work of longshoremen at the pier, as cargo was no longer handled piece by piece. The ramifications of the new technology for the shipping idnustry were also immense since the use of containers substantially decreased the costs of handling cargo, the unprofitable time a ship spends in port, and the number of ships needed to carry a certain amount of cargo.

As a result of the conflict between the interest of the shipping lines in fully utilizing this economically advantageous new technology and the interest of the ILA

in reducing the tremendous impact of this new technology on bargaining unit work, containerization was the subject of numerous disputes between the various employer associations in east coast ports and the ILA. Between 1959 and 1971, collective bargaining on this subject occurred mainly between the ILA and New York Shipping Association, Inc. (NYSA), since most of the existing containerized ships operated out of the Port of New York. The first version of the Rules on Containers was negotiated by the ILA with NYSA in 1968. In 1971, the ILA negotiated a second version of the Rules on Containers with the newly formed Council of North Atlantic Shipping Associations (CONASA). The present Rules on Containers were negotiated by the ILA and CONASA in 1974.[17] These rules require generally that when any containers owned or leased by a shipping company are to be loaded or unloaded within 50 miles of the port, these containers must be loaded or unloaded by ILA labor at the pier; however, there are several stated exceptions to this general 50-mile rule. Thus, under the 50-mile rule, the ILA does not claim: (1) the work of loading or unloading FSL containers (full shippers' loads) which are to be loaded or unloaded by the employees of the beneficial owner of the cargo, or (2) the work of unloading FSL containers which are to be warehoused for 30 days or more. The 50-mile rule specifically claims for ILA employees the work of loading and unloading any consolidated container loads, otherwise known as LCL or less-than-container-load cargo. The Rules require a shipping company to pay liquidated damages of $1,000 per container for any container handled in violation of these provisions. The Rules also prohibit a shipping company from releasing any of its containers to a consolidator located within 50 miles of the port.

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[17] Essentially identical language has been adopted in the collective-bargaining agreements covering the Ports of Miami and Jacksonville, where the employer associations are not members of CONASA.

The Administrative Law Judge's Decision

After his initial discussion of the development of containerized shipping and the evolution of the Rules on Containers, the Administrative Law Judge analyzed the traditional work of longshoremen on the pier.[18] He described the many different tasks performed by longshoremen in connection with loading and unloading cargo onto and off of a ship, such as the sorting of loose cargo; the repairing of broken boxes and bags containing cargo; the carpentry work involved in consolidating loose cargo on pallets and in securing cargo of all types in the hold of a ship; and the maintenance of equipment used to move and load cargo. He also noted that, even before modern containers were developed, longshoremen had loaded and unloaded loose cargo into and out of reusable containers owned by the shipping lines, called Conex and Dravo boxes. He found the record clearly indicated that the job opportunities for ILA-represented longshoremen had been greatly diminished because of containerization and also that the Rules on Containers were negotiated in response to these inroads on the longshoremen's work.[19]

The Administrative Law Judge then proceeded to consider whether the specific Rules on Containers negotiated by the ILA sought merely to preserve work traditionally performed by the longshoremen or instead attempted to acquire new work which longshoremen had not previously performed. He stated that his resolution of this question would be based on the guidelines set forth in *National Woodwork*,[20] where the Supreme Court stated:[21]

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[18] See sec. III, E, of his Decision, sl. op., pp. 24-26.

[19] See sec. III, F, 1, of his Decision, sl. op., pp. 26-30.

[20] *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967).

[21] 386 U.S. at 644-645.

> The determination whether [the agreement] and its enforcement violated Section 8(e) and Section 8(b)(4)(B) cannot be made without an inquiry into whether, under all the surrounding circumstances,[38] the Union's objective was preservation of work for [bargaining unit] employees, or whether the agreement and boycott were tactically calculated to satisfy union objectives elsewhere. . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees.

[38] As a general proposition, such circumstances might include the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry.

Analyzing the three factors mentioned by the Supreme Court as part of "the surrounding circumstances" to be considered, the Administrative Law Judge concluded that the first two factors were not of particular help in deciding this case since there was little dispute on those points. Thus, he found that the detrimental impact of containerization on the jobs available for ILA longshoremen was clear and therefore the threat of displacement was not remote. He also found that the evidence failed to disclose any significant ILA interest in the labor relations of the employers boycotted by the Rules.[22] However, he concluded that the third factor, the "economic personality of the industry," warranted further discussion.

The Administrative Law Judge found that, when new technology creates a general loss of work in an industry, the right of a union to negotiate an agreement restricting the use of that technology depends upon the role played by the contracting employer in developing the new technology. Thus, where the immediate employer of the em-

[22] See sec. III, F, 1, of his Decision, sl. op., pp. 26-30.

ployees who have lost work actually developed the new technology (e.g., through capital expenditure) or otherwise controls the use of this technology, then that immediate employer is the primary employer with which the union has a dispute, because it has actually undercut the job opportunities of its own employees. But, where the immediate employer did not develop the new technology and simply does business with other employers who actually developed and implemented the new technology, the immediate employer is merely a neutral or secondary employer, while the union's real dispute lies with the other employers who introduced the new technology.[23] The Administrative Law Judge concluded that the shipping lines in this case, which are the immediate employers of the longshoremen represented by the ILA, fell within the first example since the shipping lines themselves actually developed, introduced, and controlled the new technology which made containerized shipping possible. Therefore, he concluded that the ILA had a primary work preservation objective in negotiating an agreement with the shipping lines which restricted their use of this new container technology.

The Administrative Law Judge rejected the contention that containerization had created a new integrated, intermodal transportation system, which had entirely eliminated the traditional work of the longshoremen on the pier.[24] He noted the evidence did not indicate that the work of loading and unloading cargo into and out of containers was now inseparably integrated with the other work performed in connection with the transportation of this cargo; rather, to the contrary, the evidence estab-

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[23] The Administrative Law Judge cited *Carrier Air Conditioning Co.* v. *N.L.R.B.*, 547 F.2d 1178 (2d Cir. 1976), cert. denied 431 U.S. 974 (1976), and *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, 514 F.2d 433 (9th Cir. 1975), in support of this analysis.

[24] See sec. III, F, 3, a, of his Decision, sl. op., pp. 31-35.

lished that this work was presently being performed at a number of different locations by a number of different employers, including beneficial owners of cargo, consolidators, truckers, and warehouses.

The Administrative Law Judge also rejected a contention that the ILA had abandoned any claim to this work when it negotiated an agreement with NYSA in 1959, which allowed containers not loaded or unloaded by ILA labor on the pier to pass over the pier intact but provided for a royalty payment to the ILA for each such container not loaded or unloaded by ILA labor on the pier.[25] He noted that the Board had sustained this contention in *Conex*,[26] but that the Court of Appeals for the Second Circuit had expressly disavowed the Board's abandonment theory in enforcing the Board's decision in *Conex*.[27] He also noted that the Court of Appeals for the District of Columbia Circuit had rejected a similar abandonment argument in its *Associated Transport* decision,[28] which was affirmed by the Supreme Court.

Finally, the Administrative Law Judge addressed the question of whether the Rules on Containers, which he found had an overall work preservation objective, nevertheless embodied a secondary objective because the immediate employers of the longshoremen had no right to control the loading and unloading of containers away from the pier.[29] He concluded that the shipping lines did have the right to control the assignment of this work, since they owned or leased the containers and could prescribe the conditions for the release of these containers to shippers, consolidators, truckers, and warehouses. He rejected the contention that various decisions of the Federal

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[25] See sec. III, F, 3, c, of his Decision, sl. op., pp. 54-58.

[26] 221 NLRB at 960.

[27] 537 F.2d at 706.

[28] 613 F.2d at 910-911.

[29] See sec. III, G, of his Decision, sl. op., pp. 58-75.

Maritime Commission as to the legality of the Rules on Containers under the national shipping laws were determinative as to the legality of the Rules on Containers under the National Labor Relations Act. Rather, he concluded that each administrative agency should confine itself to deciding those issues arising within its own statutory area of expertise, leaving any conflicts between national labor and transportation policies to be resolved by the courts.[30]

Although the Administrative Law Judge concluded that the ILA had an overall work preservation objective in negotiating the Rules, he found that it was still necessary to examine the actual application of the Rules on Containers to various types of work in order to determine whether the Rules were tailored to preserving the particular work traditionally performed by longshoremen or rather encompassed additional work, such as work traditionally performed by other employees which was functionally distinct from the traditional work of longshoremen or which had not been created by the new technology.[31] The Administrative Law Judge then proceeded to analyze the general 50-mile rule as it applied to (1) consolidation of LCL cargo, (2) "shortstopping," which is the loading or unloading of FSL cargo by truckers in connection with surface transportation, and (3) the loading and unloading of FSL cargo by warehouses.

Consolidation [32]

In the Rules on Containers, the ILA has claimed the work of loading and unloading all consolidated (LCL)

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[30] In adopting these conclusions of the Administrative Law Judge, we find it unnecessary to rely on his discussion of the decisions of the Federal Maritime Commission, since we agree with his ultimate conclusion that the FMC rulings are not determinative of the issues in this case.

[31] See secs. III, F, 1, and III, F, 3, b, of his Decision, sl. op., pp. 26-30 and pp. 35-37.

[32] See sec. III, F, 3, b, (1), of his Decision, sl. op., pp. 37-43.

containers coming from or going to points within 50 miles of the port. The Administrative Law Judge found that ILA-represented longshoremen had traditionally performed work which was functionally related to this work, i.e., the work of consolidating loose cargo onto pallets, loading cargo into Conex and Dravo boxes, and performing the various other tasks done to prepare loose cargo for loading into the hold of a ship. He found that while some of the claimed work was performed by longshoremen on the pier after containerization, the vast majority of this work was being performed by consolidators away from the pier. He noted that this work was actually diverted away from the pier by the shipping lines themselves, who discouraged small shippers from dealing with them directly by referring shippers of LCL cargo to off-pier consolidators and by issuing tariffs charging lower rates for shipping LCL cargo consolidated off the pier than for LCL cargo sent directly to the shipping lines for ocean transport. He found that the 50-mile limit on the ILA's claim was based on a compromise worked out by the ILA and NYSA in 1968, which was intended to preserve for longshoremen that portion of the total container work in the Port of New York which they were actually performing at that time (about 20 percent). He concluded that the 50-mile rule, as applied to consolidated containers, was a rational attempt to claim only that work actually performed in the general area surrounding the port, which had previously been performed on the pier by longshoremen. Therefore, he found that the Rules on Containers did not violate Section 8(e) and Section 8(b)(4)(B) as applied to those companies functioning as consolidators within 50 miles of the port, which might include truckers and warehouses as well as consolidators.[33]

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[33] The Administrative Law Judge dismissed the entire complaint in the following cases involving only consolidators: *Dolphin Forwarding*, *Conex*, and *Puerto Rico Marine Management*.

Shortstopping [34]

In the Rules on Containers, the ILA has also claimed the work of loading and unloading all FSL containers coming from or going to points within 50 miles of the port, with certain exceptions not relevant to truckers. It is clear that the Administrative Law Judge considered the work claimed by this Rule to be functionally related to the traditional work of longshoremen in loading and unloading cargo on and off a ship for ocean transport. In addition, the Administrative Law Judge's analysis set forth above in the section on consolidation, finding the 50-mile limit on the ILA's claim to be a rational attempt to preserve existing unit work, also applies to this Rule. However, unlike his findings with respect to the consolidation work, the Administrative Law Judge found that no work claimed under this Rule had been diverted away from the piers as a result of containerization. Rather, he found that the work claimed under this Rule, at least as it applied to truckers, had traditionally been performed both by longshoremen on the pier and by truckers away from the pier. Thus, before containerization, longshoremen first unloaded cargo from a ship at the pier, then longshoremen and truckers loaded this cargo into a truck at the pier for transport to a local trucking terminal, where truckers unloaded the cargo from the truck and reloaded it into another truck for over-the-road transport. The reverse procedure also occurred. The Administrative Law Judge noted that, historically, the unloading and reloading work done by the truckers at local terminals was not done on behalf of shippers, but rather was done for reasons related to surface transportation, such as to combine several smaller truckloads into one larger truckload for delivery to the same geographic destination. The Administrative Law Judge found that, after containerization, truckers per-

[34] See sec. III, F, 3, b, (2), of his Decision, sl. op., pp. 43-47.

formed no new work at the local terminals. Instead the truckers merely continued to perform the same unloading and reloading they had always done, still for reasons related to surface transportation, such as to combine several container loads into one larger truckload, to reposition the cargo in compliance with state safety regulations, or to use trailers compatible with over-the-road tractors, which some containers are not. After containerization, however, the longshoremen no longer duplicated this work on the pier. The Administrative Law Judge concluded that the 50-mile rule, as applied to FSL containers handled by truckers, sought to claim work traditionally performed by other employees which was not created by containerization and therefore violated Section 8(e) and Section 8(b)(4)(B).[35]

Warehousing [36]

In claiming the work of loading and unloading all FSL containers coming from or going to points within 50 miles of the port, the ILA makes an exception for those FSL containers to be unloaded and stored at a warehouse for more than 30 days; however, all other loading and unloading of FSL containers at local warehouses would be prohibited by this rule. The Administrative Law Judge found that ILA-represented employees had traditionally performed loading, unloading, sorting, checking, and handling work for cargo stored on a short-term basis at marine terminal warehouses located on the pier, in addition to the traditional work performed by longshoremen in loading and unloading cargo on and off a ship.

[35] The Administrative Law Judge found such a violation in *Associated Transport*, the only case involving shortstopping. See sec. III, H, 3, of his Decision, sl. op., p. 78. However, he noted that the 50-mile rule, as applied to LCL or consolidated containers, would be lawful even where applied to truckers since any other result would subvert the valid work preservation objectives of that rule.

[36] See sec. III, F, 3, b, (3), of his Decision, sl. op., pp. 48—54.

He found that some of this short-term warehousing work was diverted away from the pier after containerization and that the 30-day storage exception was a rational attempt to distinguish between short-term storage at a marine terminal warehouse and long-term storage at an inland public warehouse, since inland public warehouses traditionally imposed a minimum monthly charge. However, he also found that some of the short-term and long-term warehousing work claimed under this rule had never been performed by ILA-represented employees at the pier, but rather had traditionally been performed only by employees at inland public warehouses, such as the ongoing storage of a manufacturer's goods for distribution on short notice to customers based on future orders and the ongoing storage of a company's purchased inventory for distribution on short notice to its foreign facilities as demand required. He concluded that the 50-mile rule, as applied to the loading and unloading of FSL containers performed in connection with warehousing services traditionally offered only at inland public warehouses, sought to acquire work traditionally performed by other employees which was not created by containerization and therefore violated Section 8(e) and Section 8(b)(4)(B). However, he concluded that an analysis as to how the rule had been applied to acquire such traditional off-pier warehousing work would have to be made on a case-by-case basis, since the evidence indicated that the ILA was entitled to claim some of the short-term warehousing work.[37]

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[37] Thus, in *Hill Creek Farms*, the Administrative Law Judge dismissed the entire complaint because it involved the unloading of FSL containers of refrigerated meat and warehousing for less than 30 days, since the short-term warehousing of frozen meat was traditionally performed by ILA-represented employees at a cold storage warehouse on the pier. In *Terminal Corporation*, he dismissed that part of the complaint dealing with the loading of FSL containers since the warehouse employees did not do the loading in connection with any traditional warehousing services, but he found a violation as to that part of the complaint dealing with the unloading of FSL

Analysis

While we agree with the Administrative Law Judge's findings and conclusions,[38] we clarify his Decision in two respects. First, it is important to set forth an explicit definition of the work in dispute. Second, we find it necessary to modify the rationale used by the Administrative Law Judge in finding that the Rules on Containers were illegal as applied to shortstopping and to certain warehousing operations.

The Supreme Court has clearly indicated that "the first and most basic question" we must answer in this remanded proceeding is "What is the 'work' that the agreement allegedly seeks to preserve?" [39] Although the work in dispute is apparent from a reading of the Administrative Law Judge's lengthy discussion of the work preservation issue, he never actually defined the work in controversy in his Decision. Clearly, he considered the work at issue to be the work claimed by the Rules on Containers. However, to clarify the record on this point, we find that the work in dispute is the initial loading and unloading of cargo within 50 miles of a port into and out of containers owned or leased by shipping lines having a collective-bargaining relationship with the ILA.

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containers of a manufacturer's goods which were then warehoused both short- and long-term for distribution against future orders. In *Beck Arabia*, he found a violation based on the loading of FSL containers with a construction company's purchased inventory which had been warehoused both short- and long-term before being loaded for shipment to its foreign construction sites. See secs. III, H, 4; III, H, 5; and III, H, 6, respectively, of his Decision, sl. op., pp. 78-82.

[38] In the third paragraph of sec. III, H, 7, of his Decision, sl. op., p. 84, the Administrative Law Judge stated, "Evidence does show that either had ever authorized SFEPA to bargain in their behalf." Apparently, the Administrative Law Judge intended to state, "Evidence does not show that . . . ." We therefore correct this inadvertent error.

[39] 477 U.S. at 505.

We agree with the Administrative Law Judge's conclusion that the ILA had an overall work preservation objective in negotiating the Rules on Containers. We also agree with his findings and conclusions regarding the application of the general 50-mile rule to consolidation, shortstopping, and warehousing. However, in adopting his conclusion that the Rules on Containers violated the Act as applied to shortstopping and to certain warehousing practices, we find it unnecessary to rely on his findings that an illegal work acquisition objective is revealed in the Rules because they "seek to compensate longshoremen for losses at the expense of inland employees whose jobs did not derive from containerization. . . ." [40] By focusing on the economic character of the trucking and warehousing industry and on the work historically performed by trucking and warehousing employees, the Administrative Law Judge's analysis appears to conflict with the Supreme Court's directions to us in its remand of this case. While the Supreme Court stated that our inquiry in this complex case would "require a broader view, taking into account the transformation of several interrelated industries or types of work . . .," the Court continued to emphasize that "the inquiry must be carefully focused . . . on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work. . . ." [41] The Administrative Law Judge's findings give undue emphasis to the work historically performed by trucking and warehousing employees and to the fact that this work was not created by containerization. We find that the proper emphasis is on the traditional work of the longshoremen and what has happened to that work.

We agree with the Administrative Law Judge's finding that the work of loading and unloading containers claimed

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[40] Fifth paragraph of sec. III, F, 3, b, of his Decision, sl. op., p. 37.

[41] 477 U.S. at 507.

by the Rules is functionally related to the traditional loading and unloading work of the longshoremen. It is clear from the Administrative Law Judge's findings on consolidation that no new work was created for consolidators after containerized shipping began. Rather, a large part of the longshoremen's traditional work was diverted away from the pier to the consolidators. Therefore, the ILA had a lawful work preservation objective in claiming this work under the Rules.

The Administrative Law Judge also found that no new work was created by containerization for trucking and warehousing employees. Further, in contrast to consolidation, no work was diverted away from the pier to the truckers and warehouses as a result of containerization, at least as to those shortstopping and traditional warehousing services involved where he found violations. Rather, after containerization, some of the traditional loading and unloading work of the longshoremen, which had historically been duplicated by trucking and warehousing employees, essentially was eliminated. While we agree with the Administrative Law Judge's conclusion that the ILA had an unlawful work acquisition objective in claiming this loading and unloading work which is now done solely by trucking and warehousing employees in connection with shortstopping and traditional warehousing services, we do not agree with his reliance on the fact that the work now done by the truckers and warehouses is work which was not created by containerization. Instead, we point to the fact that, because of the efficiency of the new technology, the duplicative work of the longshoremen, in handling cargo which is then rehandled by truckers and warehouses, no longer exists as a step in the cargo-handling process. This can be analogized to the situations in *Carrier Air Conditioning* [42] and *Associated*

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[42] *Carrier Air Conditioning Co.* v. *N.L.R.B.*, 547 F.2d 1178 (2d Cir. 1976), cert. denied 431 U.S. 974 (1977).

General Contractors,[43] where the creation of a new product entirely eliminated the work which the bargaining unit employees were seeking to preserve in the agreements found to be unlawful. Therefore, we conclude that the Rules on Containers as applied to shortstopping and traditional warehousing practices have an illegal work acquisition objective.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent labor organizations in *Associated Transport*,[44] *Beck Arabia*,[45] *Terminal Corporation*,[46] *and Custom Brokers*,[47] their officers, agents, and representatives, and the Respondent employers in *Associated Transport*[48] and

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[43] *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, 514 F.2d 433 (9th Cir. 1975).

[44] International Longshoremen's Association, AFL-CIO, Hampton Roads District Council; International Longshoremen's Association, AFL-CIO, Atlantic Coast District Council; International Longshoremen's Association, AFL-CIO; and ILA Locals 333, 846, 862, 921, 953, 970, 1248, 1355, 1429, 1458, 1624, 1736, 1783, 1784, 1819, 1840, and 1970, AFL-CIO.

[45] International Longshoremen's Association, AFL-CIO; International Longshoremen's District Council, Baltimore, Maryland; International Longshoremen's Association, Local 953; and International Longshoremen's Association, Local 333.

[46] International Longshoremen's Association, AFL-CIO; International Longshoremen's Association, Atlantic Coast District, AFL-CIO; International Longshoremen's Association, Local 333, AFL-CIO; and International Longshoremen's Association, Local 953, AFL-CIO.

[47] International Longshoremen's Association, Locals 1416, 1416-A, 1680, 1526, 1526-A, and 1922, AFL-CIO.

[48] Council of North Atlantic Shipping Associations, and Hampton Roads Shipping Association.

Custom Brokers,[49] their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached Appendix H is substituted for that of the Administrative Law Judge.

Dated, Washington, D.C. February 28, 1983

JOHN C. MILLER, Chairman

DON A. ZIMMERMAN, Member

ROBERT P. HUNTER, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

[49] Southeast Florida Employers Port Association; Coordinated Caribbean Transport, Inc.; Chester, Blackburn & Roder, Inc.; Eagle, Inc.; Eller & Company, Inc.; Harrington & Company, Inc.; Strachen Shipping Company; and Marine Terminals, Inc.

APPENDIX H

NOTICE

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

TO ALL EMPLOYEES AND EMPLOYER-MEMBERS OF SOUTHEAST FLORIDA EMPLOYERS PORT ASSOCIATION

WE WILL NOT participate in or give effect to any agreement, arrangement, or plan, express or implied, whereby employer-members of Southeast Florida Employers Port Association are to cease handling, transporting, or otherwise dealing in the products of any other processor, or to cease doing business with members of Custom Brokers and Forwarders Association of Miami, Inc., or any other person, to the extent that such an agreement, arrangement, or plan is invoked as an aid to organizing employees and encouraging their membership in the International Longshoremen's Association, or its affiliates.

WE WILL notify all our members and employees that we will not seek, participate in, or enforce any arrangement, agreement, or plan, express or implied, whereby access to maritime containers is afforded or denied to members of Custom Brokers and Forwarders Association of Miami, Inc., or any other person engaged in work off the piers, on the basis of whether they do, or do not, employ members of the International Longshoremen's Association, or its affiliates.

SOUTHEAST FLORIDA EMPLOYERS
PORT ASSOCIATION
(Employer-Association)

Dated _____ By _____
(Representative) (Title)

CHESTER, BLACKBURN &
RODER, INC.
(Employer-Member)

Dated _____ By _____
(Representative) (Title)

COORDINATED CARIBBEAN
TRANSPORT, INC.
(Employer-Member)

Dated _____ By _____
(Representative) (Title)

EAGLE, INC.
(Employer-Member)

Dated _____ By _____
(Representative) (Title)

ELLER & COMPANY, INC.
(Employer-Member)

Dated _____ By _____
(Representative) (Title)

HARRINGTON & COMPANY, INC.
(Employer-Member)

Dated _____ By _____
(Representative) (Title)

STRACHEN SHIPPING COMPANY
(Employer-Member)

Dated _____ By _____
(Representative) (Title)

MARINE TERMINALS, INC.
(Employer-Member)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Robert L. Timberlake Jr. Federal Office Building, Room 706, 500 Zack Street, P.O. Box 3322, Tampa, Florida 33602, Telephone 813-228-2662.

APPENDIX D

JD-515-81
New York, NY
Baltimore, MD
Jacksonville, FL
Miami, FL
Philadelphia, PA
Mullica Hill, NJ

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case Nos. 2-CC-1364; 1365
2-CE-75

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION
and
NEW YORK SHIPPING ASSOCIATION, INC.
and
DOLPHIN FORWARDING, INC.
and
SAN JUAN FREIGHT FORWARDERS, INC.

5-CC-791; 792
5-CC-793; 794

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION *et al.*
and
COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS
and
HAMPTON ROADS SHIPPING ASSOCIATION
and
TIDEWATER MOTOR TRUCK ASSOCIATION
and
ASSOCIATED TRANSPORT, INC.
and
HOUFF TRANSFER, INC.

12-CC-1002; 1004

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1408
and
PUERTO RICO MARINE MANAGEMENT, INC.
and
INTERNATIONAL CONTAINER EXPRESS, INC.

22-CC-541; 554
22-CE-19; 20

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION
and
NEW YORK SHIPPING ASSOCIATION, INC.
and
CONSOLIDATED EXPRESS, INC.
and
TWIN EXPRESS, INC.

5-CC-925; 929

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, *et al.*
and
THE TERMINAL CORPORATION

4-CC-1133
4-CE-55

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1242
and
HILL CREEK FARMS, INC.

12-CE-30

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1416, *et al.*

and

CUSTOM BROKERS & FORWARDERS ASSOCIATION OF MIAMI BEACH, INC.

Case No. 5-CC-889

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1359, *et al.*

and

BECK ARABIA, LTD.

22-CE-44; 45; 46

NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

and

AMERICAN TRUCKING ASSOCIATIONS, INC. and TWIN EXPRESS INC. and INTERNATIONAL ASSOCIATION OF NON-VESSEL OPERATING COMMON CARRIERS

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO (and its Affiliated Local Unions) and ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

and

WEST GULF MARITIME ASSOCIATION and SOUTHEAST FLORIDA EMPLOYERS ASSOCIATION and MOBILE STEAMSHIP ASSOCIATION INC. and SOUTH ATLANTIC AND GULF DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

22-CC-806; 807; 808

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO (and its Affiliated Local Unions) and ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATIONS, AFL-CIO (NEW YORK SHIPPING ASSOCIATION INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS)

and

AMERICAN TRUCKING ASSOCIATIONS INC. and TWIN EXPRESS INC. and INTERNATIONAL ASSOCIATION OF NON-VESSEL OPERATING COMMON CARRIERS

Case Nos. 22-CE-47
(formerly 5-CE-67)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO (and its Affiliated Locals) and ATLANTIC COAST DISTRICT COUNCIL, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

and

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATION and STEAMSHIP TRADES ASSOCIATION OF BALTIMORE, INC. (and its Affiliated Members)

and

AMERICAN TRUCKING ASSOCIATIONS, INC.

22-CE-48
(formerly 5-CE-68)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO (and its Affiliated Locals) and ATLANTIC COAST DISTRICT COUNCIL, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

and

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS and HAMPTON ROADS SHIPPING ASSOCIATIONS (and its Affiliated Members)

and

AMERICAN TRUCKING ASSOCIATIONS, INC.

22-CC-809
(formerly 5-CC-984)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO (and its Affiliated Locals) and ATLANTIC COAST DISTRICT COUNCIL, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO (STEAMSHIP TRADE ASSOCIATION OF BALTIMORE, INC.)

and

AMERICAN TRUCKING ASSOCIATIONS, INC.

22-CC-810
(formerly 5-CC-985)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO (and its Affiliated Members and ATLANTIC COAST DISTRICT COUNCIL, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO and HAMPTON ROADS DISTRICT COUNCIL, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO (HAMPTON ROADS SHIPPING ASSOCIATION)

and

AMERICAN TRUCKING ASSOCIATIONS, INC.

Bernard Suskewicz, Esq., of Newark, NJ, and *Harvey A. Holzman, Esq.*, of Baltimore, MD, *Bruce A. Harris, Esq.*, of Coral Gables, FL, *Carmen P. Cialino, Jr., Esq.*, of Philadelphia, PA, *Robert T. Kofman, Esq.*, of Philadelphia, PA, *Mary Schuitte, Esq.*, of New York, NY, *Joseph P. Norelli, Esq.*, of Washington, DC, and *James C. Holcomb, Esq.*, of Washington, DC, *Michael Fitzsimmons, Esq.*, of Newark, NJ, for the General Counsel.

Thomas W. Gleason, Esq., of New York, NY, on behalf of Respondent Unions and *Martin Vigderman, Esq.*, of Philadelphia, PA, on behalf of Respondent-Union Local 1242.

Constantine P. Lambos, Esq. and *Donato Canuso, Esq.* (*Lorenz, Finn, Giardino & Lambos*), of New York, NY, on behalf of Respondent New York Shipping Assn., Inc.

Francis A. Scanlan, Esq., of Philadelphia, PA, for Respondent CONASA.

Donald T. Ryce, Jr., Esq. and *Lewis E. Shelley, Esq.* (*Hogg, Allen, Ryce, North & Blue*), of Coral Gables, FL, on behalf of Respondent Southeast Florida Employers Port Assn.

Braden Vandeventer, Esq. (*Vandeventer, Black, Meredith & Martin*), of Norfolk, VA, on behalf of Respondent Hampton Roads Shipping Assn.

Roland Wilder, Jr., Esq. and *David J. Gzesh, Esq.*, of Washington, DC, on behalf of Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Intervenor.

J. Alan Lips, Esq., Mark S. Sauter, Esq. and *Thomas R. Schuck, Esq.* (*Taft, Stettinius & Hollister*), of Cincinnati, OH, on behalf of American Trucking Assn., Inc., and Tidewater Motor Assn., Charging Parties.

Arthur Lieberstein, Esq., of New York, NY, on behalf of San Juan Freight Forwarders, Inc., Charging Party.

Anthony A. DeSabato, Esq. (Kleinbard, Bell & Brecker), of Philadelphia, PA, on behalf of Hill Creek Farms, Inc., Charging Party.

William L. Auten, Esq. (Blakeney, Alexander & Mechen), of Charlotte, NC, on behalf of Houff Transfer, Inc., Charging Party.

Martin Schneiderman, Esq. and *Felice Busto, Esq. (Steptoe & Johnson)*, of Washington, DC, and *Raymond P. de Member, Esq. (Garson, de Member & Weiner)*, of Fairfax, VA, and *Thomas G. Travis, Esq.*, of Miami, FL, on behalf of Int'l Association of Customs Brokers & Forwarders; Twin Express, Consolidated Express, Int'l Container Express, International Association of Non-Vessel Operating Common Carriers, Charging Parties.

Warren M. Davison, Esq. and *Eric Hemmendinger, Esq. (Shawe & Rosenthal)*, of Baltimore, MD, on behalf of Terminal Corporation, Charging Party.

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DECISION AND SUPPLEMENTAL DECISION

Statement of the Case

JOEL A. HARMATZ, Administrative Law Judge: This consolidated proceeding derives essentially from remand by the Supreme Court of the United States on June 20, 1980, in *N.L.R.B.* v. *International Longshoremen's Association*, 447 U.S. 490, whereby remedial orders of the National Labor Relations Board in *Dolpin Forwarding, Inc.*, 236 NLRB 525 (1978) and *Associated Transport, Inc.*, 231 NLRB 351 (1977) were vacated. Pursuant thereto, said cases were remanded for further consideration of the Board's conclusion in each that the "Rules on Containers" negotiated between the ILA and various steamship associations embodied a secondary objective and hence were banned as "hot cargo" agreements under Section 8(e) and, further, that enforcement thereof resulted in secondary boycotts as set forth in Section 8(b)(4)(B) of the Act.[1]

Pursuant thereto, by Orders dated January 19, February 18, and February 20, 1981, said cases were consolidated with others pending at various administrative or judicial levels which also presented issues concerning the validity of the "Rules on Containers." Thus, the instant proceeding was broadened to include the following:

1. *Consolidated Express, Inc.*, 221 NLRB 956 (1975) enf'd 537 F. 2d 706 (C.A. 2, 1976), cert. den. 429 U.S. 104 (1977).[2]

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[1] Certiorari was granted by the Supreme Court from the Circuit Court of Appeals for the District of Columbia, which at 613 F.2d 890 (C.A.D.C., 1979), denied enforcement and remanded.

[2] The Second Circuit Court of Appeals which had enforced the violations found by the Board in *Consolidated Express, Inc.*, the lead case treating the "Rules," recalled its mandate and remanded that case to the Board, pursuant to the Supreme Court's decision referred to above.

2. *Puerto Rico Marine Management, Inc.*, 245 NLRB No. 171 (1979), and *Beck Arabia, LTD*, 245 NLRB No. 172 (1979), both of which were pending before the Courts of Appeals for the 5th and 4th Circuits, respectively, at the time of the Supreme Court's decision.

3. *Terminal Corporation*, 250 NLRB 8 (1980), which the Board elected to reconsider, *sua sponte*.

4. *Hill Creek Farms, Inc.*, Case Nos. 4-CC-1133, 4-CE-55 and *Customs Brokers & Forwarders Association of Miami, Inc.*, Case No. 12-CE-30, which were pending before the Board at the time of the Supreme Court's Decision on exceptions to decisions of administrative law judges.

5. Also consolidated with the above cases was a new complaint issued in *American Trucking Association, Inc., et al*, on February 10, 1981, which formed the predicate for a 10(1) injunction against enforcement of the "Rules on Containers" during the period following issuance of the Supreme Court's Decision.[3]

Pursuant to Order of the Board, on February 24, 1981, on due notice, a prehearing conference was conducted before the undersigned. Thereafter, offers of proof were submitted on behalf of the parties requesting further hearing. On March 13, 1981, the undersigned issued an Order to Show Cause as to why certain portions of the submitted offers of proof should not be accepted as fact.[4] Further, on March 19, 1981, the undersigned issued "Rul-

[3] A 10(1) injunction was issued on February 24, 1981, restraining enforcement of the Rules in all Gulf and Atlantic ports, by District Judge Herbert J. Stern in *Pascarell* v. *N.Y.S.A., et al*, No. 81-13 (D.N.J.) Judge Stern's ruling was subsequently affirmed by the Court of Appeals for the Third Circuit. No. 81-1308 (May 20, 1981), 107 LRRM 2426.

[4] See ALJ Exhibit 4(a).

ings on Offers of Proof and Definition of Issues to be Litigated at Hearing",[5] and on March 30, 1981, a "Ruling on Order to Show Cause and Further Definition of Issues to be Litigated at Hearing".[6]

On April 7, 1981, the hearing was opened before the undersigned in New York, New York. On that date, the parties stipulated that the entire proceeding be decided upon: (1) the existing records in these consolidated cases,[7] (2) certain material on pages 25, 26, and 27 of ALJ Exhibit 4(a), (3) the record certified to the Third Circuit Court of Appeals in *Pascarell* v. *N.Y.S.A., supra*, the recent 10(1) proceeding,[8] and (4) post-hearing submissions of ". . . various public documents that would include the tariffs and bills of lading on file with the Federal Maritime Commission."[9]

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[5] See ALJ Exhibit 4(b). Interlocutory appeals were taken from said rulings by the Charging Parties, American Trucking Association and Tidewater Motor Truck Association (ATA-TMTA) and the Respondents.

[6] See ALJ Exhibit 4(c).

[7] Charging Party ATA-TMTA, at said hearing, declined to join said stipulation, reserving solely in the interest of perfecting a further offer of proof. Pursuant to rejection of said offer by the undersigned, ATA duly appealed to the Board, which on June 1, 1981, found merit in ATA's appeal. Accordingly, ATA Exh. 9, consisting of collective bargaining agreements negotiated between ILA and various employer groups in the Port of Hampton Roads, Virginia, during the year 1964, is hereby received.

[8] Joint Exhibit 1.

[9] Consistent with the aforesaid stipulation, after close of the hearing, the parties jointly stipulated to the submission of certain tariffs involved in the controversy over the "Rules". Accordingly, the record is hereby reopened, and Joint Exhibit 2(A), 2(B), and 2(C); 3; 5(A) and 5(B); 6(A), 6(B) and 6(C); 7; 8; 9; 10(A) and 10(B); 11(A), 11(B) and 12(A) are hereby received.

In addition, on a post-hearing basis, ATA-TMTA offered its proposed Exhibits 1 through 8 inclusive, consisting of tariffs filed with various Federal agencies. Those documents are public in nature and

On June 4, ATA-TMTA, and on June 15, 1981, Respondents, respectively withdrew their requests for special permission to appeal the rulings theretofore made by the undersigned which were then pending before the Board. Accordingly, they, too, joined the above stipulation constituting the record herein. Thereafter briefs were filed on behalf of the General Counsel; Charging Party ATA-TMTA; Charging Parties International Association of Non-Vessel Operating Common Carriers, Twin Express, Custom House Brokers and Forwarders Association of Miami, Inc.; Charging Party Houff Transfer, Inc.; Charging Party San Juan Freight Forwarding, Inc.; Respondents NYSA, CONASA and ILA; Southeast Flor-

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consist of matters of which official notice is taken. Further, they are within the guidelines set forth by the undersigned at the April 7 hearing, assented to by all parties, for the submission of post-hearing evidence. Accordingly, ATA's Exhibits 1 through 8 inclusive are received.

The sole controversy regarding the post-hearing offers relates to two separate submissions proffered the Respondents NYSA, CONASA, and ILA. The first, Respondents' Exhibit 1, was filed on June 15, 1981. It consisted of a certified copy of the North Atlantic Continental Freight Conference Agreement No. 9214 on file with the Federal Maritime Commission. On June 30, 1981, ATA-TMTA filed objections to the receipt of the foregoing as beyond the scope of the stipulation, irrelevant and immaterial. Contrary to ATA-TMTA, Respondents' Exhibit 1, together with other submissions of the parties, contributes to the relevant background, is within the contemplated agreement of the parties as to the documents to be offered on a post-hearing basis, and represents a document, as to which official notice might be taken. Respondents' Exhibit 1 is received.

A second submission was made by the Respondent on July 6, 1981, consisting of an affidavit, together with attachments, which are neither self-authenticating nor public documents of which official notice might be taken. On July 9, 1981, counsel for ATA filed a formal opposition to the receipt of this proffer. Accordingly, as Respondents seek to expand the record as delimited at the hearing to include matter of a testimonial nature, under conditions transcending the agreement of the parties, Respondents' Exhibit 2 is hereby rejected.

ida Employer's Port Association; Intervenor American Warehousemen's Association; and Intervenor International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Based upon the stipulated record, together with further rulings heretofore made herein, and upon consideration of the post-hearing briefs, it is hereby found as follows:

Findings of Fact

I. Jurisdiction [10]

Respondent-NYSA and Respondent-CONASA are organizations composed of employers engaged in the interstate and international transportation of freight and commodities which exist for the purpose, *inter alia*, of representing their employer-members in negotiating and administering collective bargaining agreements with various labor organizations including the I.L.A. and the I.L.A. Atlantic Coast District.

Respondent-West Gulf Maritime Association (WGMA) is an organization composed of employers engaged in the interstate and international transportation of freight and commodities and which exists for the purpose, *inter alia*, of representing its employer-members in negotiating and administering collective bargaining agreements with various labor organizations including I.L.A. and the I.L.A. South Atlantic and Gulf Coast Districts.

Southeast Florida Employer's Association (SFEA) is an organization composed of employers engaged in the interstate and international transportation of freight and

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[10] Jurisdictional findings made herein relate solely to Case Nos. 22-CE-44, 22-CC-806, *et al*, which arise upon a complaint issued on February 10, 1981, on unfair labor practice charges filed by ATA and by Twin Express, Inc. on December 19, 1980. Like findings with respect to the remaining cases have been previously made on full records, and do not bear repeating.

commodities and which exists for the purpose, *inter alia*, of representing its employer-members in negotiating and administering collective bargaining agreements with various labor organizations including the I.L.A. and the I.L.A. South Atlantic and Gulf Coast Districts.

Respondent-Mobile Steamship Association, Inc. (MSA) is an organization composed of employers engaged in the interstate and international transportation of freight and commodities and which exists for the purpose, *inter alia*, of representing its employer-members in negotiating and administering collective bargaining agreements with various labor organizations including the I.L.A. and the I.L.A. South Atlantic and Gulf Coast Districts.

Respondent-Steamship Association of Baltimore, Inc. (STAB) is an organization composed of employers engaged in the interstate and international transportation of freight and commodities and which exists for the purpose, *inter alia*, of representing its employer-members in negotiating and administering collective bargaining agreements with various labor organizations including the I.L.A. and the I.L.A. Atlantic Coast District.

Respondent-Hampton Roads Shipping Association (HRSA) is an organization composed of employers engaged in the interstate and international transportation of freight and commodities and which exists for the purpose, *inter alia*, of representing its employer-members in negotiating and administering collective bargaining agreements with various labor organizations including I.L.A. and I.L.A. Atlantic Coast District and Hampton Roads District Council.

The ATA is a trade association composed of 51 state motor carrier trade associations, including TMTA, which in turn are composed of individual motor carriers engaged in the interstate and international transportation of freight and commodities.

Twin Express, Inc., a New Jersey corporation with an office and place of business in North Bergen, New Jersey, has been a Non-Vessel Operating Common Carrier engaged in overseas transportation of freight and commodities.

The International Association of Non-Vessel Operating Common Carriers (IANVOCC) is a trade organization composed of employers including Charging Party Twin Express, Inc., engaged in the interstate and international transportation of freight and commodities by sea.

During the 12 month period ending on or about December 1, 1980, the employer-members of NYSA and CONASA, respectively, in the course and conduct of their above described business operations derived gross revenue in excess of $50,000 for the transportation of freight and commodities from the State of New Jersey and from the United States of America directly to various foreign countries.

During the 12 month period ending on or about December 1, 1980, the employer-members of the WGMA, in the course and conduct of their above described business operations derived gross revenues in excess of $50,000 for the transportation of freight and commodities from the State of Texas directly to points outside the State of Texas and from the United States of America directly to various foreign countries.

During the 12 month period ending on or about December 1, 1980, the employer-members of the SFEA collectively, in the course and conduct of their above described business operations, derived gross revenues of $50,000 for the transportation of freight and commodities from the State of Florida directly to points outside the State of Florida and from the United States of America directly to various foreign countries.

During the 12 month period ending on or about December 1, 1980, the employer-members of the MSA collec-

tively, in the course and conduct of their above described business operations, derived gross revenues in excess of $50,000 for the transportation of freight and commodities from the State of Alabama directly to points outside the State of Alabama and from the United States of America directly to various foreign countries.

During the 12 month period ending on or about December 1, 1980, the employer-members of STAB collectively, in the course and conduct of their above described business operations, derived gross revenues in excess of $50,000 for the transportation of freight and commodities from the State of Maryland directly to points outside of the State of Maryland and from the United States of America directly to various foreign countries.

During the 12 month period ending on or about December 1, 1980, the employer-members of HRSA collectively, in the course and conduct of their above described business operations, derived gross revenues in excess of $50,000 for the transportation of freight and commodities from the State of Virginia directly to points outside the State of Virginia and from the United States of America directly to various foreign countries.

During the 12 month period ending on or about December 1, 1980, the employer-members of the IANVOCC collectively, in the course and conduct of their above described business operations, derived gross revenues in excess of $50,000 for the transportation of freight and commodities from the State of New York directly to points outside the State of New York and from the United States of America directly to various foreign countries.

During the 12 month period ending on or about December 1, 1980, Twin Express, Inc., in the course and conduct of its above described business operations derived gross revenues in excess of $50,000 for the transportation of freight and commodities from the State of New

Jersey directly to points outside the State of New Jersey and from the United States of America directly to various foreign countries.

During the 12 month period ending on or about December 1, 1980 employer-members of ATA, including TMTA, in the course and conduct of their business, derived revenues exceeding $50,000 for the transportation of freight and commodities as between the various states of the United States of America.

The complaint, as amended alleges, the answer admits and I find that Respondent NYSA, CONASA, WGMA, MSA, STAB and HRSA are now, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and persons engaged in commerce or in an industry affecting commerce within the meaning of Section 8 (b) (4) of the Act.

The complaint as amended alleges, the answer admits and, I find that the employer-members of the IANVOCC and subordinate bodies of ATA, including TMTA, are and have been at all times material herein employers engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act and persons engaged in commerce within the meaning of Section 8(b) (4) of the Act.

The complaint, as amended alleges, the answer admits and I find that Twin Express, Inc. is, and has been at all times material herein an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act and a person engaged in commerce within the meaning of Section 8(b) (4) of the Act.

II. The Labor Organizations Involved

The complaint as amended alleges, the answer admits and I find that the International Longshoremen's Association, ILA Atlantic Coast District, ILA Hampton Roads

District Council, and ILA South Atlantic and Gulf Districts are and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Definitions*

Unitization	—The consolidation of a number of individual items into a larger shipping unit for easier handling. It is also the securing or loading of one or more items of cargo onto a single structure, such as a pallet.
Stripping	—The act of unloading cargo from a container.
Stuffing	—The act of loading cargo into a container.
LCL or Consolidated Container Load	—A container which consists of cargo of more than one shipper or consignee.
FSL	—A container which consists of cargo of a single shipper or consignee.
Shortstopping	—A practice of motor carriers whereby loaded containers are stripped and reloaded into surface trailors.
LTL	—A surface trailer which includes less than a load to capacity *or* cargo of more than one shipper or consignee.
Bill of Lading	—The contract of cartage between a carrier and shipper, consignee, or their agent, pertaining to cargo transport.
Interchange Agreement	—Agreement between steamship company any shippers, consignees, their agents and trucking companies pertaining to their use of the former's containers.
Tariff	—Rates, services and conditions published by a carrier informing shippers, consignees and their agents as to rates and terms governing cargo transport.

NVOCC —A Non-Vessel Operating Common Carrier by sea, which is licensed by the Federal Maritime Commission (FMC) to provide ocean transport services. Though they neither own, nor operate ships, they are treated by the FMC as a carrier.

FAK Rate (Freight, All Kinds) —The discount afforded under tariffs of steamship companies to shippers who consolidate containerized cargo away from the piers. Also referred to as the "consolidators allowance".

House to House —Import maritime trade designation that container be delivered from initial surface shipping point to surface destination without intermediate stripping.

Pier to House —Import maritime trade designation that container stuffed at port of export be delivered to surface destination without intermediate stripping.

House to Pier —Import maritime trade designation that container be delivered from initial surface shipping point to import pier for stripping.

Pier to Pier —Import maritime trade designation that container stuffed at pier on export, be stripped on arrival at pier on import.

B. *Preliminary Statement*

This omnibus proceeding opens a further round of litigation concerning labor restraints upon the utilization of seaborne containers. Hopefully, reconciliation of the issues involved will extend a measure of predictability to labor and industry as to the circumstances under which collective bargaining may dictate lawfully, directly or indirectly, the conditions under which shippers, importers, and their agents must adapt their methods of operation to that technological advance. Broadly stated the critical issues center upon collision between the provisions of the Act which, on the one hand, protect employee utilization of collective bargaining to preserve their job security, and, on the other hand, those which protect neutral em-

ployers from secondary boycotts by interdicting negotiated contracts designed to broaden a job-security dispute beyond the immediate employer.

The various complaints which form the heart of this proceeding are addressed to the so-called "Dolphin Agreement" and its progeny. By virtue thereof, CONASA and the ILA agreed to job guarantees for deepsea ILA labor which imposed limitations upon container handling by others at offshore locations within 50 miles of the Port. This so-called "50-mile rule" has impacted adversely upon container handling practices within various segments of the seaborne transport industry, including freight consolidators, motor carriers, and warehousemen. The latter are within the class, who in this proceeding, seek relief from the "50 mile rule", and join the General Counsel in urging that the "Rules on Containers" possess secondary objectives within the ban of Sections 8(e) and 8(b)(4)(A) and (B) of the Act. Insofar as material, these Sections of the Act provide as follows:

> 8(e) It shall be unfair labor practice for any labor organization and any employer to enter into any . . . agreement, . . . whereby such employer agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. . . .
>
> 8(b)(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, . . . process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to

threaten, coerce, or retrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . *Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.* (Emphasis supplied.)

C. *The Issues*

Basically the Rules on Containers in the form negotiated in 1973, allowed containers, both export and import, to pass over the piers intact if stuffed more than 50 miles beyond the port area in the case of export cargo, or destined in tact to a point more than 50 miles beyond the port area in the case of import cargo. Also, exempted were those stuffed or stripped within the port by employees of the beneficial owner of the cargo or in the case of import cargo, those stripped by a bona fide warehouse contemplating storage and charges for the cargo for at least 30 days. All containers involved in domestic inter-coastal maritime trade were also exempt. With respect to all others, the Rules awarded deepsea ILA labor the right to stuff or strip containers if that work was to be performed within the 50 mile geographic area of the Port. This work allocation formula was to be enforced by the payment of liquidated damages by Steamship companies in the amount of $1,000 per container for each

infraction of the rules, and, more importantly, by a prohibition upon steamship companies from releasing their containers to those engaged in practices in contravention of the Rules.

The challenge to the legitimacy of these rules under the National Labor Relations Act opened with the filing of unfair labor practice charges on June 1, 1973, in *Consolidated Express, Inc.*, 221 NLRB 956, herein referred to as *Conex*, on behalf of two offshore consolidators, engaged, *inter alia*, in the consolidation of export cargo within the 50 mile port area. In that case the National Labor Relations Board, with approval of the Second Circuit Court of Appeals,[11] concluded that the Rules violated Section 8(e), and that their enforcement against the freight forwarders, violated 8(b)(4)(B) of the Act. The issue turned upon whether the objective underlying the Rules was worked preservation or work acquisition. Broadly stated, a labor organization may legitimately preserve or recapture work traditionally performed within the collective bargaining unit which is threatened or diminished by shifts in the contracting employer's operational methods. On the other hand, negotiated agreements or pressures to force a contracting employer to cease doing business with others runs afoul of the statutory restraints on secondary boycotts where undertaken to acquire new work not formerly performed by represented employees. In the latter context, the contracting employer is a neutral, with the union's real grievance being with non-unit employers whose employees are engaged in the performance of such work. Accordingly, the Board in *Conex*, examined the work sought by the Rules and after contrasting that traditionally performed by waterfront labor with that of the offshore consolidators, rejected the defense urged by the ILA and the New York Shipping Association (NYSA) that the rules merely had

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[11] 537 F.2d 706 (C.A. 2, 1976).

the primary objective of preserving work lost by longshoremen. It was reasoned that traditional longshore work had been to load and unload ships, and duties incidental thereto, all of which was performed at the pier. On the other hand, the work in controversy, and claimed by the Rules, was viewed as that traditionally performed by consolidators at offshore locations. Thus, the rules were viewed as an effort by ILA to acquire new work, rather than to preserve that which was historically performed at the pier.

Prior to the Supreme Court's consideration of the Board's position, complaints were issued challenging the legitimacy of the rules as they applied to NVOCCs,[12] warehousemen who stripped or stuffed containers within the port area [13] and motor carriers that shortstopped containers for stripping at trucking stations within the port

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[12] *Dolphin Forwarding, Inc.*, 236 NLRB 525 (1978) herein referred to as *Dolphin*; *Puerto Rican Marine Management, Inc.*, 245 NLRB 171, and *Custom Brokers and Forwarders Association of Miami, Inc.*, 12-CE-30, JD-147-80, herein called *Custom Brokers*. In this latter case, the ALJ dismissed a complaint alleging that the rules violated 8(e) as applied in the port of Miami. This holding, based upon the ALJ's analysis of traditional work practices in that Port, represents the only exception to otherwise uniform determinations by the Board that the rules were secondary on their face, and as enforced. The Board had not completed its review of that determination prior to remand of that case and its consolidation herewith.

[13] See the *Terminal Corporation*, 250 NLRB 8, herein called *Terminal*, and *Hill Creek Farms, Inc.*, Case 4-CC-1133 and 4-CE-55, JD-188-81, herein called *Hill Creek*. As was true of *Custom Brokers*, the latter was pending on exceptions to the Board, at the time of the Supreme Court's decision. One additional case, *Beck Arabia Ltd.*, 245 NLRB No. 172 (1979) involved an off pier operator, which was also engaged in warehousing cargo, but which traditionally, prior to containerization, had been engaged in packing cargo for export, in large boxes, either owned by it, or supplied by its customers. (See *Shipside Packing*, 227 NLRB 654, 227 NLRB 659).

area.[14] All of these cases have been consolidated in this proceeding.

Among them, *Associated Transport* and *Dolphin* were reviewed by the Court of Appeals for the District of Columbia Circuit,[15] whereupon enforcement of the Board's orders therein were denied and both were remanded. Certiorari was granted by the Supreme Court. In *N.L.R.B.* v. *International Longshoremen's Association*, 447 U.S. 490 a majority of the Supreme Court, speaking through Mr. Justice Marshall, agreed with the District of Columbia Circuit, that the Board had misapplied the work preservation doctrine as enunciated in *National Woodwork Manufacturer's Association* v. *N.L.R.B.*, 386 U.S. 612 (1967), by defining the work in dispute as "the off pier stuffing and stripping of containers", a determination which was viewed as resting too heavily upon the element of "location", at the expense of other factors bearing upon whether, under all the surrounding circumstances, the union's objective was preservation of work for bargaining unit employees, or whether the agreement ". . . [was] tactically calculated to satisfy union objectives elsewhere. . . ." [16]

Pursuant to the remand, and the consolidation orders of the Board, the following issues have been certified in this proceeding:

1. Whether, under more comprehensive examination of controlling principle, the Rules on Containers embody a proscribed secondary objective as seeking to acquire work neither traditionally performed, nor fairly claimable by longshoremen in the primary work units.

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[14] *Associated Transport, Inc.*, 231 NLRB 351 (1977) herein called *Associated Transport.*

[15] 613 F.2d 890, (C.A.D.C., 1979).

[16] 447 U.S. at 511.

2. If not, whether the Rules on Containers nonetheless are to be deemed secondary as imposing an obligation upon signatory employers to guarantee work which they are powerless to assign to their employees.

Said questions strike at the facial validity of the Rules. However, further questions of lesser impact are also presented. First, even assuming that the Rules are upheld as primary, and legitimately enforceable through labor caused disruption of business relationships, questions remain as to whether their application, in certain circumstances, reflect an expansive interpretation in furtherance of disputes not germane to matters of legitimate interest to the primary work unit.[17]

Finally, this consolidated proceeding includes a new complaint issued by the General Counsel on February 10, 1981, which for the first time is subject to litigation herein. That complaint relates to the action on December 6, 1980, of ILA and various steamship associations operating within ports on the Atlantic and Gulf Coasts in agreeing to reimplement the rules effective January 1, 1981. It raises issues under 8(e) and questions as to whether 8(b)(4)(i)(ii) pressures were invoked for an object proscribed by Section 8(b)(4)(A), as well as 8(b)(4)(B).

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[17] For example, the General Counsel urges that even if the Rules are validated under the work preservation and right of control tests violations nonetheless exist in *Beck Arabia* because the steamship companies involved in that proceeding were not signatory to the rules. A question also is raised by the General Counsel as to the propriety of a critical conclusion by the ALJ in *Custom Brokers*, that two *offshore* consolidators, employing ILA labor, to whom work was directed as a result of ILA pressures, were actually part of the primary work unit. See e.g., *International Longshoremen's Association, Local 1575, AFL-CIO* v. *N.L.R.B.* (San Juan Freight Forwarders), 560 F.2d 439 (C.A. 1, 1977); *ILA (U.S. Naval Supply Center)*, 195 NLRB 273.

Before passing to more substantive areas it is necessary to observe certain unusual qualities concerning this proceeding, which itself encompasses nine separate cases. This vehicle provides an opportunity to resolve the validity of the Rules in all 36 major ports on the Atlantic and Gulf Coasts where longeshoremen are represented by the ILA. This undertaking, to the extent influenced by practices before and after the advent of modern containers, necessarily turns upon factual development and an existing record confined to the ports of New York, Philadelphia, Baltimore, Hampton Roads, Jacksonville, and Miami. This sample includes certain ports where imports constitute the greater percentage of cargo handled, and others were exports exceed imports substantially. Nonetheless, the record as now constituted is viewed as ample to permit universal findings with respect to the matters in controversy. Differences in the historic development of containerization and work practices in the areas fully examined on the extant records, appear to be insubstantial and fail to suggest any infirmity in this proceeding as an appropriate vehicle for resolution of the controversy on an all-port basis.[18]

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[18] The basic struggle between dock-side labor and employees of motor carriers, consolidators, and warehousemen, is the same at each port. Many of those engaged at the surface end of the transport system operate on a multi-port basis and others are free to relocate or otherwise pass their containers through ports of their choice. This is exemplified by the Philadelphia experience with respect to the importation of meat products. Thus, "reefers" or refrigerated containers containing frozen meat did not appear in the port of Philadelphia until 1972 or 1973. Initially, all stripping of such containers occurred at port side by ILA labor. As time went by, the ILA allowed reefers to pass intact if designated "House to House" or "Pier to House." However, after the Union took action against certain Philadelphia warehousemen who allegedly violated the 30 day rule, unfair labor practice charges were filed and a 10(1) injunction obtained in June 1979, against enforcement of the Rules in the port of Philadelphia. This injunction had a substantial impact on the work available to longshoremen flowing from the importation of meat from Australia and Venezula. Thus, prior to the

D. *The Development of Containerization, the Impact of Containerization Upon Longshore Labor, and the Evolution of the Rules on Containers*

Mr. Justice Marshall succinctly defined the sea borne container technology as follows:

> Containers are large, reusable metal receptables, ranging in length from 20 to 40 feet and capable of carrying upwards of 30,000 pounds of freight, which can be moved on and off an ocean vessel unopened. Container ships are specially designed and constructed to carry the containers, which are affixed to the hold. A container can also be attached to a truck chassis and transported intact to and from the pier like a conventional trailer.
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> * * * *
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> Before the introduction of containerships, and as is still the case with conventional vessels, trucks delivered loose or break-bulk, cargo to the head of the pier. The cargo was then transferred piece by piece from the truck's tailgate to the ship by longshoremen employed by steamship or stevedoring companies. The longshoremen checked the cargo, sorted it, placed it on pallets and moved it by fork-lift to the side of the ship, and lifted it by means of a sling or a hook into the ship's hold. The process was reversed for cargo taken off incoming ships. With the advent of containers, the amount of on-pier work involved in cargo handling has been drastically reduced, since

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injunction, the port of New York, which had few off shore cold storage facilities, received over 80 percent of reefers containing imported meat. Of these, some 90 percent were strippd at the pier by deep sea ILA longshoremen. After the injunction issued, the principal port of entry for this product shifted from New York to Philadelphia. Shipments going to the Port of Philadelphia soon exceeded shipments received at the port of New York. In Philadelphia, however, approximately 90 percent of the "reefers" were stripped off pier.

> the cargo need not be loaded and unloaded piece by piece. The amount of work available for longshoremen has been further reduced by the shipping companies' practice of making their containers available to shippers and consolidators for loading and unloading away from the pier.
>
> Containerization, then, was a technological advance of great importance to the shipping industry which at the same time threatened the jobs of longshoremen by dramatically increasing their productivity. As one might expect, the subject has been a hotly disputed topic of collective bargaining between the union and the employers.[19]

Containerization is nothing more than a capital intense and sophisticated means of *unitizing* cargo. The concept of utilizing goods for transport in all probability dates back to the sack devised from animal skin, a means of conveyance which might well predate the wheel. In this sense, containerization is an outgrowth of the most primitive form of human resourcefulness. Although the sack continues as a usable form of utilization, in a more recent era, the drive of man to save his energy, time, and costs, led to the consolidation of cargo in cartons, crates, or bound to pallets. Where sea borne cartage was involved, whether longshoremen unified the loose cargo at the docks or simply handled it as utilized by the shipper or its agent, depended on a number of factors, including services and facilities offered by the steamship company and the election of the shipper. A clear demarcation between who performed what, when and where in connection with unitized marine cargo is probably one that never was and never will be subject to clear isolation between marine carriers and those who use and complement their services. Nonetheless, cargo pre-packaged offshore through various methods utilizing non-marine equipment,

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[19] 447 U.S. at p. 494-496.

such as railroad cars, prior to and since the development of modern containerization,[20] was almost always allowed to pass over the piers intact even though deep-sea longshoremen possessed the ability and always did in fact perform similar work. Consistent with this practice, the Rules on Containers do not apply to cargo unitized through a shippers' device but only to containers owned or leased by signatory steamship companies. Insofar as the record in this proceeding indicates, adverse reaction on the part of the ILA historically to boxes outside of the scope of this latter limitation was at best isolated, and never an institutional objective. In any event, the historic practices of ILA, to leave undisturbed, cargo unitized through devices owned by non-marine interests is viewed as lending little, if any, aid to resolution of the basic issues in this case.

The advent of the modern container presented the unitization issue in a new light. Materials packed, bound, crated or loaded offshore in a conveyance owned and exclusively held by shippers posed little threat to the traditional ILA work *in the hold* of the vessel. However, the overseas container was not only developed and financed by steamship companies, but its functional utility suggested to longshoremen that this innovation did no more than afford the hold of a vessel with inland transferability, thereby threatening not only their work, but removal as well as the physical area that theretofore had been their exclusive work domain. The ILA's indifference to the former may not reasonably be equated with its reaction to the latter.

In tracing this reaction it is noted that the immediate forerunners of the modern container appeared on the

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[20] It is observed that in the late 1920s, trade between New Orleans and Cuba was serviced by sea-going vessels, specifically designed to carry freight cars without handling of their content on the docks.

waterfront in the late 1940s. The First to appear were the "Conex" and "Dravo" boxes. Both were owned by steamship companies, were reusable, and were customarily 8 feet in length. Initially, both were stripped and stuffed exclusively by deep-sea ILA labor, but later, apparently at request of certain shippers, were made available for offshore stuffing by non-ILA labor.[21]

During the mid 1950s, larger containers ranging from 12 to 20 feet in length appeared in the port of New York. However, until 1957, all were carried on the decks of conventional break-bulk vessels. In 1957, the first specialized container ship appeared in the ports of New York and Jacksonville, Florida.[22]

The reception afforded by the deepsea dock workers to containerization was one of resistence. The first protest in the form of a grievance emerged in 1958 and arbitration thereof resulted in a ruling against the ILA. Collective bargaining negotiations in 1959 opened with the ILA demanding that all containers be stripped and stuffed on the pier by dockside workers.[23] This was countered by

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[21] It does not appear that the ILA refused to handle these boxes intact, or in any way resist. The practice of the steamship companies to release empty Dravo or Conex boxes to shippers for offshore stuffing, appears to have been limited to Puerto Rican trade routes, and although not specifically delimited by the evidence, it is hardly presumable that this extended to a significant percentage of tonnage when compared with the total volume of break-bulk.

[22] Mechanized equipment for the handling of containers came much later in other ports. Thus, in Philadelphia, Baltimore and Hampton Roads, modern containers did not appear until the mid 1960s, with the first container crane appearing in Philadelphia in 1971, and in Baltimore in 1968.

[23] During the period which coincided with the development of containerization, the ILA sought a change in the basic bargaining format in the industry. Thus, prior to 1956, the ILA and NYSA negotiated agreements in the port of New York and after agreements had been reached in those negotiations, the ILA would bargain with various associations in the other ports. In that year, ILA

NYSA with a demand that the employers be recognized as possessed of the unqualified right to inaugurate and regulate automated operations. The differences were ultimately resolved by an agreement recognizing the Employer's right "to use any and all types of containers without restrictions or stripping by the Union." But the settlement also included a provision that: "Any work performed in connection with the loading and discharging of containers for Employer-members of NYSA which is performed in the Port . . . whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at the longshore rate." The parties also agreed that a royalty would be paid to union welfare funds with respect to each container passed over the piers intact.

As a practical matter in the 1959 agreement did little to allay unrest. Its term was marked by wildcat strikes in protest of containerization. Employee disenchantment was fanned by ILA's interpretation of the 1959 agreement as only permitting the free movement of those containers which originated beyond the Port area and as not affording the steamship companies any rights with respect to LCL containers. This ongoing dispute led to the issuance of a formal statement to the ILA by NYSA on February 28, 1962, which led to the first accord imposing a restraint on offshore consolidation of containers. In material part, the NYSA conceded as follows:

> Where an employer-member of NYSA supplies a container which is the property of such member, to a consolidator for loading or discharging of cargo in the Port of Greater New York, it will be stipulated

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sought to extend the framework of bargaining to a coast-wide basis. Following a strike, it was agreed that NYSA would execute a master contract on behalf of itself and the other Atlantic ports with respect to certain basic issues. After negotiation of the master agreement, local agreements would be negotiated in the individual ports.

that such container must be loaded or unloaded by ILA at longshore rates.

The 1962, contract renewal negotiations, again involved issues concerning job security raised on behalf of ILA, with NYSA seeking full relief from the earlier imposed restrictions. A strik[e] ensued. The Taft-Hartley emergency disputes package was invoked, and a Presidential Mediat[ion] Panel headed by Senator Wayne Morris, recommen[ded] that a comprehensive study on Manpower Utilization and Security be prepared by the United States Department of Labor within the ensuing term of the new agreement. The parties accepted this recommendation and in consequence no changes were made at that time to the containerization provisions. However, the employers agreed to establish a guaranteed income plan (GAI) which was the first of its kind in the industry. Here again, the settlement failed to stabilize unrest on the waterfront. Again during its term, longshoremen refused to handle prestuffed containers and in 1966, the ILA sought to reopen the agreement with respect to the container issue. NYSA declined this latter request, but met on a number of occasions with ILA in an unsuccessful effort to resolve the continuing problem.

In the meantime, as of 1967, though containerization had been largely confined to the Puerto Rican trade route, the tonnage of containerized cargo had reached 20 percent of all cargo handled in the Port of New York. That same year, the large North Atlantic trade route, which had previously been served exclusively by conventional bulk cargo vessels, was augmented by the introduction of the first fully containerized vessel by Sea Land Service, Inc., the steamship company that has been dubbed the pioneer of containerization technology. Competitive conditions led many steamship companies to embark on new programs for the building and utilization of specialized container vessels and equipment.

New contract negotiations scheduled for 1968 were preceded by an ILA convention in Miami Beach in 1967 at which a resolution was adopted requiring all containers to be stuffed and stripped by ILA labor at deep sea rates at waterfront facilities, piers or terminals. ILA opened the 1968 negotiation with a demand tailored to that resolution, and once more containerization had become the major issue dividing the parties. A strike of 57 days ensued in the port of New York, which continued for more than 100 days in certain other ports on the Atlantic and Gulf Coasts. The emergency dispute provisions of the Taft-Hartley Act were invoked with the board of inquiry defining the issues as follows:

> The two critical issues relate to union-wide collective bargaining and the impact or consequence of containerization and mechanization.

The resulting agreement included a provision making it clear that LCL containers consolidated in the port area were to be stuffed and stripped by ILA labor, at the piers or docks. The specific terms of this restriction are set forth below:

> Containers owned or leased by employer-members (including containers on wheels) container LTL loads or consolidated full-container loads, which are destined for or came from, any person (including a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo, and which either comes from or is destined to any point within a 50 mile radius from the center of any North Atlantic District port shall be stuffed and stripped by ILA labor at longshore rates on a waterfront facility under the terms and conditions of the General Cargo Agreement.

At the same time, agreement was reached to increase the GAI contributions.[24]

The compromise negotiated in 1969, was not substantially dissimilar and may be said to have codified the position taken by NYSA in its letter to ILA of February 28, 1962. It was recognized that this accord contractually reserved to ILA deep sea labor only 20 percent of the total containerized cargo handled in New York, with the remaining 80 percent excluded from any ILA stuffing and stripping restrictions.[25]

The 1970s brought about a dramatic increase in containerization.[26] Utilization of containers in new international trade routes continued to broaden.

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[24] Testimony discloses that the "50 mile rule" finds it origin in grievance processing dating back to 1957 in the port of New York. Thus, the term "50 miles from Columbus Circle" had been repeatedly relied upon in resolving grievances and labor disputes during that period. The covered area included the Long Island, New York City, and New Jersey docks which had been historically recognized as encompassing the Port of New York. See Affidavit of Edward J. Heine, Jr., Joint Exh. 1, pp. 1035, 1038.

[25] Intercontinental Container Transport Corporation sought to enjoin enforcement of this version of the Rules based on their alleged illegality under the Anti-Trust laws. The United States Court of Appeals for the Second Circuit, in *International Container Transportation Corp.* v. *New York Shipping Association, Inc., and International Longshoremen's Association,* 426 F.2d 884 (C.A. 2, 1970), concluded that the 1969 Rules were lawful as within the anti-trust exemption for labor agreements. At the same time, the moving party in that proceeding filed unfair labor practice charges with the National Labor Relations Board in Case Nos. 22-CE-12 and 22-CC-389. Those charges were dismissed by the Regional Director for Region 22. Said dismissal was affirmed by the General Counsel of the National Labor Relations Board on October 16, 1970.

[26] It is noted that in an affidavit an expert witness related that "by the end of 1968 more than 50 percent of U.S. imports, and at least around the same percentage of general commodities exports were containerized at off pier facilities." See Joint Exhibit 1, pp. 833. These figures are considered suspect in the light of other evi-

Prior to the 1971 negotiations, certain steamship associations including the NYSA, STAB, HRSA, PMTA, The Boston Shipping Association, Inc. and the Rhode Island Shipping Association, Inc. formed CONASA as a multi-employer bargaining association representing them in negotiations with the ILA on a multi-port basis. Thus, instead of NYSA negotiating the pattern agreement, ILA negotiated such an agreement with CONASA. Said negotiations were confined to wages, hours, welfare contributions, pension contributions, agreement term, containerization and LASH.[27] Other terms and conditions were to be reserved for negotiation locally in each of the separate ports. CONASA was apparently an outgrowth of compromise in response to the Union's demands dating back to 1968 for coast-wide collective bargaining.

The 1971 negotiations resulted in a coast-wide strike, which was enjoined by a Taft-Hartley injunction. Containerization was again the key issue, with ILA not so much concerned with further restrictions on the utilization of containers, but upon methods of assuring that the existing rules were honored uniformly and without their violation being condoned by the steamship companies. The settlement ultimately renewed the contract for a term of

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dence, including the fact that containerization until 1967 or 1968 was not a major factor at such ports as Philadelphia, Baltimore and Hampton Roads.

[27] The specialized container ship was not the only innovative vessel contributing to mechanization on the waterfront. LASH vessels with a "lighter-aboard-ship" can handle approximately 70 barges, carrying about 350 to 500 tons of cargo each, including hundreds of containers. LASH loading productivity averages approximately 1.5 tons per man hour compared with the .5 tons per man hour on a break-bulk vessel, and the 2.54 tons per man hour on a fully automated container ship. A further development was the RO-RO, or roll-on/roll-off ship, the rear section of which includes a ramp which may be lowered to the dock enabling trailers, containers, or other forms of break-bulk cargo to be driven directly off the ship. The productivity a RO-RO operation is 3. tons per man hour.

3 years, incorporating the existing rules in the new agreements with minor modifications, including an increase in the royalty payments.

Continuing concern on the part of ILA as to non-enforcement of the Rules dated from their inception in 1968. Finally this problem came to a head in mid-1972, when the ILA, through its president, Thomas W. Gleason, Sr. informed NYSA that rule information ". . . have now grown to where there is a complete abrogation and disregard of the contract with respect to the loading and stripping provisions. . . ." At that time, notice was served upon participating employers that unless all violations were stopped immediately, the ILA would invoke its contractual right to suspend the Rules, an eventuality which was generally understood as the equivalent of a threat to refuse to handle any containers stripped or stuffed inland. In response, the NYSA informed all steamship carriers and stevedore companies by letter on May 12, 1972, that the Rules must strictly be observed, stating that "The ILA is particularly disturbed by the increased use of consolidators and truckers to perform work which is clearly within the jurisdiction of the ILA under the contract." Despite stepped-up investigation and enforcement efforts by joint labor management committees, the ILA remained dissatisfied with "the spread of consolidation stations operated by steamship carriers as well as those outside the industry" and again threatened a suspension of the Rules. On November 20, 1972, as the number of violations detected by container investigators continued to climb, a meeting was held at the Whitehall Club with management representatives at which the ILA strongly asserted that the supply of containers to consolidators was a violation of the contract and that all containers would be stopped unless the stevedore contractors and carriers began to live up to the agreement. By virtue of the Whitehall meeting, a document entitled "Enforcement of Rules on Containers" was drafted and proposed

for execution by all marine carriers. In January 1973, a meeting of the CONASA-ILA container committee was held in Dublin, Ireland where this document in its final form was adopted as "Interpretative Bulletin No. 1". The new accord is that which is more widely referred to as the "Dublin agreement".

Though its stated purpose was merely the promulgation of rules for the uniform and effective *enforcement* of the Rules on Containers, the Dublin supplement, for the first time, explicitly referred to FSL containers stuffed and stripped within 50 miles of the port by other than the beneficial owner's employees. Excluded, however, from the newly defined restriction, was the stripping of FSL cargo by warehouse employees at a "*bona fide*" warehouse where the beneficial owner pays normal warehouse storage fees for a minimum period of 30 days with the beneficial owner retaining title to the cargo for a period of at least 30 days without transfer. The Dublin rules also gave birth to a new means of enforcement; namely, a ban on delivery of containers to those who violate the Rules and with liquidated damages being assessed against participating steamship companies that provided access to containers by consolidators, warehousemen, and motor carriers, who stripped or stuffed them in violation of the Rules.

The 1974 negotiations opened with a retreat by the ILA to its original position, demanding that all stuffing and stripping be performed at the pier facility with deep sea ILA labor. In the course thereof, the ILA observed that between 1967 and 1973, deep sea longshore employment in the port of New York had been reduced by approximately 50 percent in terms of both jobs and man hours lost. CONASA also retreated, by taking the position that all containers should be permitted to move across the pier without restriction by the ILA. The final agreement merely reincorporated the "Dublin Agreement."

However, this settlement did not quell ILA's continuing complaint as to violations of the Rules by the steamship carriers. In April 1975, the Rules were suspended by the ILA and all containers in North Atlantic ports were stripped at the piers with the exception of FSL cargo. After a month, the dispute was settled through a further restatement eliminating the warehouse exception with respect to export cargo. With respect to import cargo, that exception required *actual storage* in a bona fide warehouse for a minimum period of 30 days. The restatement also clarified the principle in prior CONASA-ILA decisions that trucking stations where containers are unloaded within the geographic area of the port do not constitute bona fide warehouses with respect to cargo destined for delivery outside the 50 mile area.

The 1977 collective bargaining agreement adopted the Rules without significant modification, with the parties agreeing to a further increase in container royalty payments.

Following the Supreme Court's decision in 1980, on December 6, 1980 the ILA, CONASA, and other steamship associations in the Atlantic and Gulf Coasts agreed to implement the Rules as of January 1, 1980 in all ports except Philadelphia, where an injunction against the rules was still in effect.

Looking back at the 13-year period since 1969, it is clear that it marked a steady decline in longshore work. The 1968 agreement was based on accommodation whereby 80 percent of the containerized cargo would be beyond the Rules and permitted to move freely intact without stripping and stuffing at the piers, while the remaining 20 percent of containerized cargo would be stuffed or stripped at the pier. In 1968, the port of New York handled approximately 7 million tons of containerized freight and 12 million tons of break-bulk. In 1974, however, containerized cargo had grown to 19 million

tons, while break-bulk had declined to 8 million tons. According to Thomas W. Gleason, Sr., the ILA president, the average daily ILA workforce as of 1975 in the port of New York had declined from the 1968 level of 27,000 men to 8500. According to John Heinz, executive vice-president of NYSA, as of 1980, that figure had been reduced to 7500.

E. *The Traditional Work of Deepsea ILA Labor*

The historic jurisdiction of pier side longshoremen includes all work in connection with the loading and unloading of cargo on ships, including removal of ocean cargo from the tailgate of the delivery truck[28] to the hold of the steamship vessel for outbound export cargo including such related intermediate steps as receipt, storage sorting, checking, palletizing, cargo repair, carpentry, maintenance and delivery. With respect to inbound cargo, the dock workers have traditionally performed identical work, but in reverse. As part of its traditional work, deepsea ILA labor has unitized break-bulk cargo for shipment on pallets and in boxes and has broken down unitized import cargo into break-bulk in preparation for its delivery to surface carriers.

The work complement at the piers typically includes terminal labor, ship labor and specialized crafts. Ter-

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[28] The loading and unloading of trucks at the piers is subject to varying practices. Since 1953, in the port of New York, Longshoremen assisted truckdrivers in loading trucks, but truckdrivers usually unloaded the trucks alone. At Philadelphia, truckdrivers had the option of loading and unloading trucks or of requesting that longshoremen perform these functions. At Hampton Roads, longshoremen actually loaded and unloaded cargo into and out of the trucks. At the very least, however, the jurisdiction of longshoremen began and ended at the tailgate of the truck. These variances are viewed as immaterial. For the loading and unloading of trucks at the piers is viewed as a neutral factor which throws no light upon assessment of the legitimacy of the Rules.

minal work consist of the receipt, handling and delivery of cargo to and from the truck, railroad car other inland conveyance, and its removal on pallets to points within the pier or terminal. Those termed ship labor work in gangs and are responsible for moving cargo from the dock into the hold of the vessel or on import, from vessel to dock. The craftsmen include checkers who are responsible for tallying cargo and insuring that the receipt and delivery is properly recorded; carpenters, who construct pallets and install dunnage for the proper storage of cargo on the vessel; coopers, who repair broken bags and boxes; clerks, who are responsible for the dock plan and delivery books assuring at all times that all cargo received, delivered, and on hand is accounted for; maintenance personnel and electricians, whose responsibility consisted of maintaining equipment and machinery at the terminal facility.[29]

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[29] Historically, the unit covered by the Rules in the various ports, included various dock workers, clericals, and craftsmen, engaged in the functions described in the above text. Charging Party ATA-TMTA contends that this was not the case in the port of Hampton Roads. The evidence on which ATA-TMTA relies in this regard is inconclusive. ATA Exhibit 9 consists of integrated agreements in the port of Hampton Roads for a term of October 1, 1964 to September 30, 1968. Those agreements do not on their face, as the ATA contends, clearly establish that the port-wide bargaining unit in Hampton Roads was fragmented to establish separate appropriate units. The fact that separate local agreements negotiated along functional lines were signed by individual employers, who may well have been members of Hampton Roads Maritime Association and authorized to bargain by the latter with respect to local conditions affecting their immediate enterprises, does not necessarily compromise the integrity of a more comprehensive multi-employer unit. In any event, the version of the Rules under challenge in this proceeding are those adopted in 1973 and 1980. The contracts in evidence in the *Associated Transport* case (General Counsel's Exhibit 3 and General Counsel's Exhibit 4) plainly reflect that the parties in the basic "preamble" to those agreements have confirmed that they ". . . have heretofore entered into a master contract with respect to wages, hours, the amount of contributions for welfare and pension benefits . . . , and duration of the term for the collective

With respect to unitized cargo, the official position of the ILA has laid no claim to handling the contents of shipper-owned receptables at the piers.[30] Thus, cargo stuffed off pier in railroad cars for shipment intact through specialized vessels has been allowed to pass over the piers without handling by ILA Deepsea labor.[31] On the other hand, since development of the Conex and Dravo boxes to the present, ILA labor at the piers has stripped and stuffed containers. Although the spread of containerization produced offshore operations which reduced the man hours available to deepsea ILA labor, the basic skills and duties of the latter have remained unchanged and remain extant within the dock side bargaining units. Physically, certain waterfront installations did change as containerization increased, with steamship companies and terminal operators having constructed many large container sheds at which deepsea ILA labor at pier side process cargo into and out of modern containers.

F. *Work Preservation*

1. The Controlling Authority

The work preservation doctrine is the pivotal reference in reconciling the conflict between the secondary boycott provision of the Act and the statutory policy whereby ". . . the labor relations questions raised by changes in the means of production are answered by the parties themselves rather than State intervention." *International*

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bargaining agreements. . .". Accordingly, the record does not persuade that the Local negotiations prior to 1973 altered the preestablished port-wide bargaining unit.

[30] See *Continental Express*, affidavit of Gleason dated April 19, 1974.

[31] As of 1980, the ILA work force in the port of New York consisted of 12,264. Of this group, some 7500 are hired on a daily basis and rarely reaches the 8000 mark. See Joint Exhibit 1, affidavit of John Heinz, executive vice-president of NYSA.

Longshoremen's Association, AFL-CIO v. N.L.R.B. (Dolphin and Houff Transfer), 613 F.2d 890, 902 (C.A.D.C. 1979).

Literally, the proscriptive scope of the boycott provisions of the Act are broad enough to include every disruption of business relationships inspired by a labor organization. The guarantee of work under the Rules to ILA, like other collectively bargained restraints on labor saving innovations, has impacted adversely upon business dealings between steamship companies and others, often to the prejudice of the latter. Under well established authority, however, this inevitable consequence will not necessarily support intervention of the Board's remedial process.

Section 8(e) and 8(b)(4)(B) serve "dual Congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *N.L.R.B.* v. *Denver Building & Construction and Trade Council*, 341 U.S. 675, 692 (1951). The identity of the primary or offending employer is the key to analysis as to which interest prevails. The impact of an agreement upon other employers whose business might be severely affected is incidental and irrelevant to that inquiry. Similarly, a free system of collective bargaining demands that the right of employees to negotiate job preservation agreements not be impeded by the social or economic benefits to be gained within the community by the unrestrained proliferation of a job eroding technology. See *National Woodwork, supra*, 386 U.S. at p. 644. Instead, it is the nature of the contracting union's grievance and the means of its resolution which afford the central focal point. "The touchstone [of lawful primary activity] is whether, under all the surrounding circumstances, the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis a vis* his own

employees . . ." or "tactically calculated to satisfy union objectives elsewhere." See *National Woodwork, supra*, 386 U.S. at p. 644-654. These fundamental considerations are interwoven into the guidelines set forth by Mr. Justice Marshall in defining the scope of the instant remand as follows:

> Viewing the work allegedly to be preserved by the Rules from the proper perspective, the Board will be free to determine whether the Rules represent a lawful attempt to preserve traditional longshore work, or whether, instead, they are "tactically calculated to satisfy union objectives elsewhere.". . . This determination will course by informed by an awareness of the Congressional preference for collective bargaining as the method for resolving the disputes over dislocation caused by the introduction of technological innovations in the workplace. . . . Thus, in judging the legality of a thoroughly bargained and apparently reasonable accommodation to technological change, the question is not whether the Rules represent the most rational or efficient response to innovation, but whether they are a legally permissable effort to preserve jobs. 447 US at p. 511.

On the instant record, there can be little question that containerization reduced job opportunities for ILA deep-sea labor, and that the Rules represented a negotiated response to accommodate the resulting inroads on ILA work jurisdiction. With this in mind, it is noted that the General Counsel herein appropriately concedes that ". . . it is well settled that unions and employers lawfully may enter into agreements which, . . . entirely prohibit subcontracting of work normally performed or fairly claimable, by employees in the bargaining unit covered by the contract."

At the same time, however, labor organizations may not utilize their strength at the bargaining table to ac-

quire new work not previously performed by them,[32] or work similar to that previously performed in the primary work unit which, though not created by the technology, has been performed traditionally in other sectors by other employees.[33] Thus, a labor organization though permitted to use the boycott as a "shield to preserve the jobs . . . of its own employees in the unit," may not engage in such action as a sword wielded "to reach out to monopolize jobs or acquire new job tasks when their own jobs are not threatened by the boycotted product." See e.g., *National Woodwork*, *supra*, 386 U.S. at p. 630-631. Furthermore, as cautioned in *N.L.R.B.* v. *Enterprise Pipefitters*, 429 U.S. 507 at p. 529 ftn. 16:

> The distinction between primary and secondary activity does not always turn on which group of employees the union seeks to benefit. There are circumstances under which the union's conduct is secondary when one of its purposes is to influence directly the conduct of an employer other than the struck employer. In these situations, a union's efforts to influence the conduct of the nonstruck employer are not rendered primary simply because it seeks to benefit the employees of the struck employer. *National Woodwork* itself embraced the view that the Union's conduct would be secondary if its tactical object was to influence another employer. . . .

As the foregoing attests identification of the work in dispute is simply "the first and most basic question." [34] It is not dispositive. The inquiry must extend to "all

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[32] See e.g., *Sheet Metal Workers, Local 223* v. *N.L.R.B.*, 498 F.2d 687, 696 (C.A.D.C. 1974).

[33] *Local Union 282, IBT (D. Fortunato, Inc.)*, 197 NLRB 673 (1972).

[34] *I.L.A.* v. *N.L.R.B.*, 447 U.S. at p. 505.

the surrounding circumstances. . .",[35] including (1) the remoteness of the threat of displacement by the banned product or services, (2) the history of labor relations between the union and the employers who would be boycotted, and (3) the economic personality of the industry.

Of the above factors, the "economic personality of the industry" is the standard of greatest value to the proponents of the instant complaints. For while the detrimental impact of containerization upon ILA employees is clear, the evidence fails to disclose any significant ILA interest in the labor relations of the class of employers boycotted by the Rules.

The economic personality of the industry as it relates to containerization and the Rules has not been explored exhaustively in prior cases. Whatever the dimension of this factor, the vital reference point remains whether the objectives are relevant to the primary work unit, or seek to reconcile differences with other employers. And the economic advantages to be reaped by the technology remain irrelevant under this standard.

The utility of this standard lies in the relevance of industry practices and work patterns to the status of the contracting employer as an offender of the job interests of its own employees. Where technology, automation or new business methods create a general loss of work within an industry, determinations under the Act as to which labor organization may legitimately invoke collective bargaining against their employers, within what limits, and under what circumstances, depends initially upon the role of their employer in the evolution and development of such changes. For where the immediate employer is a stranger to the development of such processes and simply does business with others that have introduced the job saving technique, the former is a neutral whose sole offense to his employees is the mainte-

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[35] *National Woodwork, supra,* 386 U.S. at p. 644.

nance of business relationship with those who are the true offenders.[36] In such circumstances, the contracting employer has not itself undercut job opportunities and the union's real dispute is addressed to others who did.

On the other hand, where the technology is devised, developed by capital expenditure, or otherwise controlled or expanded upon by the contracting employer different conclusions may obtain. For generally, a labor organizations has the right through collective bargaining to restrict the action taken by the contracting employer which reduces benefits within the represented unit. In such circumstances, the immediate employer is the offender. Thus, employees generally are entitled, through the bargaining process, to regulate or resist such forms of managerial judgment by insisting upon their elimination or restriction. However, that right is not unqualified. Restrictions imposed through bargaining upon the unit-spawned technology, even though ostensibly to preserve traditional unit work, may violate the secondary boycott provisions of the Act. Often such provisions create work assignment disputes between separate groups of employees within separate employing entities who have historically performed work not substantially distinct from that which the agreement claims. Just as the ILA could not compensate for job losses due to containerization by acquiring the work of others functionally distinct from that historically performed by them on the piers, the ILA may not compensate for such job losses by reaching out and claiming work of such a character which is and has been indigenous to an entirely different industry which was not created or influenced significantly by the new technology. Whether that is the case here requires consideration of the traditional work practices of the ILA

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[36] See e.g., *Carrier Air Conditioning Co.* v. *N.L.R.B.*, 547 F.2d 1178 (C.A. 2, 1976) *cert. den.* 431 U.S. 974 (1976); *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, 514 F.2d 433 (C.A. 9, 1975).

against that of the industries adversely affected by the Rules, but only insofar as the economic character of each discloses that ILA is claiming more than the container technology removed from the piers.

2. The Contentions that the Rules Lack a Work Preservation Objective

In support of the complaints, it is contended that through the development of containerization, traditional work of longshoremen has been removed beyond fair claim by the Rules. This view is maintained on what appears to be alternative grounds.

First it is argued that through containerization, a new intermodal transportation system emerged, which is the equivalent of a new product, dispensing with ILA work traditionally performed at seaport terminals. In support of this view, precedent is cited both to the effect that (1) the capacity of ILA represented employees to stuff and strip containers is not dispositive of a work preservation objective,[37] and (2) that work merged or interwoven into a new overall product, outside of the primary work unit, is neither traditional unit work nor fairly claimable.[38] Based on these authorities, it is argued that, as the handling of containers when performed by consolidators, motor carriers, and warehousemen, has been intermingled with and is incidental to other services which cannot be performed on the pier, the work of the longshoremen has simply disappeared.

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[37] See e.g., *Local Union No. 282, International Brotherhood of Teamsters (D. Fortunato), Inc.*, 197 NLRB 673 (1972).

[38] See e.g., *Retail Clerks Union Local 324, Federated Department Stores, Inc.*, 235 NLRB 711 (1978), *Plumbers and Steamfitters Local Union 342 (Conduit Fabricators, Inc.)*, 225 NLRB 1364 (1976), remanded, 598 F.2d 216 (C.A.D.C. 1979), on remand, 251 NLRB 794 (1980). See also *Carrier Air Conditioning Co.* v. *N.L.R.B.*, 547 F.2d 1178 (C.A. 2, 1976), cert. denied 431 U.S. 974 and *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, 514 F.2d 433 (C.A. 9, 1975).

It is further urged, in the alternative, that prior to 1973, when the Dublin agreement was reached, the ILA abandoned its claim to both FSL and LCL containers. Thus, it is argued on behalf of International Association of NVOCCs, Twin Express, Inc. and CHBFA, together with the Intervening Teamsters Union, that the 1959 ILA-NYSA agreement, while requiring the payment of a premium to ILA benefit plans, authorized free utilization of all containers without stripping, restuffing or other ILA interference, and hence embodied a waiver of any right with respect to LCL or FSL cargo. Charging Parties Houff Transfer and ATA-TMTA contend that the absence of any negotiated restrictions until 1973 upon FSL cargo evidenced an abandonment by ILA of any claim to such work and acknowledgment by the latter that FSL cargo was not historically within its jurisdiction.

On behalf of Twin Express, the NVOCCs and CBFA of Miami, it is further argued that the 50 mile rule is secondary on its face because (1) ILA had utilized it as an organizational device in one or more ports, and (2) the evidence does not disclose that the work performed by longshoremen at the piers was displaced by that performed by NVOCCs and consolidators.

3. Conclusions

a. Has the Intermodal Containerization System Produced a New Product Eliminating the Work Claimed by the Rules.

On this record, it must be conceded that longshoremen historically, as an incident to the loading and unloading of vessels at dock side, have not only handled, sorted, checked, and stored break-bulk cargo, but to date have continuously stripped and stuffed modern containers at the pier. At the same time, other segments of the transportation industry, servicing shippers and importers, have performed this identical work offshore. Those

antagonistic to the Rules on Containers contend that through containerization, "sweeping" technological changes transformed the maritime industry into one which is intermodal in nature and drastically altered traditional work practices both on and off the piers. It is argued that more than a shift in location at which the work is performed is involved. It is further observed that the convenience with which containers may be interchanged intact between the steamship company, trucking company, warehouses, and beneficial owner of the goods, has created specialized services which are available offshore, an essential element of which is the stuffing and stripping of containers. The industry it is argued has undergone a transformation and the stuffing and stripping of containers performed by longshore employees as an ancillary part of a steamship company's ocean transport system has been eliminated by this new and different service available solely through offshore carriers, which, as the argument goes, no longer relates to the work traditionally and historically performed by longshore employees. In other words, as stated in the ATA-TMTA offer of proof submitted to the undersigned under date of March 5, 1981:

> The work sought under the Rules is not the same as the old ILA work or functionally related to it because the development of the intermodal transportation system, of which containerization is merely a facet, has so changed the nature and kind of freight transportation process that that the terminal points of shipment and receipt of cargo now naturally fall, when the customer so dictates, away from old seaport terminals.

The above contention, at least superficially, appears to be another attempt to characterize the work in dispute as that performed offshore and hence to collide with the Supreme Court's criticism of the Board's rationale in *Conex* and related cases. However, to the extent that this

argument rests upon viable precedent reconciliable with the rationale of *National Woodwork, supra*, and the instant remand, it warrants consideration. However, the analysis may not lose sight of the basic reference, i.e., whether the Rules on Containers are addressed to the preservation of work in the primary work unit, or whether they are in furtherance of union objectives elsewhere. In this sense at least one aspect of this argument was not addressed by the Supreme Court, but finds support in Board and Court decisions.

Thus, in *Associated General Contractors of California, Inc.*, v. *N.L.R.B.*, 514 F.2d 433, (C.A. 9, 1975), a plumbing subcontractor and union had agreed to a provision requiring fabrication of pipe for specialty units to be performed by the subcontractor's employees. A dispute emerged under this agreement when the employer acquired a subcontract for the *installation* of stainless steel surgical scrub stations which included certain prefabricated piping. The Court in finding that the agreement violated Section 8(e) and that the pressure to enforce that agreement violated Section 8(b)(4)(ii)(B) concluded, that as the sinks which were manufactured offsite included sophisticated mechanisms, requiring precision tooling on alignment, they constituted a new product entailing work which was beyond that traditionally and historically performed by on-site plumbers. Thus, the objective of the agreement was ". . . to acquire work performed by employees of . . . [the offsite manufacturer]. . . ." The real dispute was between the plumbers and the offsite manufacturer, and hence the plumbing subcontractor was a neutral.

A like result was reached in 1976, by the Second Circuit Court of Appeals, on somewhat similar facts in *Carrier Air Conditioning Co.*, v. *N.L.R.B.*, 547 F.2d 1178 (C.A. 2, 1976). In that case, an employer association entered an agreement with a local of the sheet metal workers union not to contract out work relating to

"plenums," a metal box attached to an air conditioning unit which aids in the abatement of noise, while regulating the flow of air into a room. Later, Carrier, a manufacturer of air conditioning products, developed and produced what was called the "Moduline Air Conditioning Unit". With respect to this product, the plenum was factory installed and integrated into the manufactured product under conditions requiring special equipment and special skills held by Carrier's manufacturing employees. The Union, from the time that the moduline was introduced, opposed its installation within its jurisdiction. In finding that the Union's agreement was unlawful the Court viewed the moduline was a new product, which integrated plenums into an overall air conditioning system which entailed precision abrasion work, distinct from that traditionally and historically performed by sheet metal workers. Accordingly, insofar as the subcontracting clause applied to the moduline plenum, the Union was "trying to acquire work performed by employees of Carrier in Tyler, Texas." The Court applied Justice Harlan's observation in *National Wood Work Manufacturer Association* v. *N.L.R.B.*, 386 U.S. at 648, stating that this is a "case of a union seeking to restrict by contract . . . an employer with respect to the products he uses, for the purpose of acquiring for its members work that had not previously been theirs."

While the *Associated General Contractor* and *Carrier* cases involve reversals or modifications of prior Board decisions, the Board adopted a like rationale to support 8(e) and 8(b)(4)(ii)(B) violations in *Plumbers and Steamfitters Local Union 342, et al., (Conduit Fabricators, Inc.)*, 251 NLRB No. 794.[39] That case involved a

[39] This was a supplemental decision, wherein the Board reaffirmed violations initially found at 225 NLRB 1364. However, the Circuit Court of Appeals for the District of Columbia remanded on grounds that it was unable to determine from the Board's decision precisely what work was the subject of the Union's claim on behalf of its members.

so-called union standards clause limiting the subcontracting of certain pipe fabrication work to offsite subcontractors. A general contractor, who was signatory to this agreement, purchased prefabricated cement lined pipe, coated with lead paint, from an Employer, whose employees were represented by a different union, and who worked at standards less than required by the above labor contract. The offsite fabrication of the pipe involved seven steps in the overall processing of the product, only one of which consisted of work traditionally performed at the job site by employers signatory to the contract. As the steamfitters did not restrict their claim to that work, the Board concluded that steamfitters' claim for the entire fabrication was ". . . an attempt to acquire work which had not previously been performed by unit employees at the job site or in the contractor's shops . . .", and therefore "is work that was not fairly claimable." 251 NLRB at p. 6-7. The Board noted in this connection that "the cutting and welding work is an integral part of the entire fabrication which has not been traditionally or customarily performed by the unit employees at the job site or in the contractors' shops." [40]

In my opinion the *Associated General Contractor* line of cases does not brand the Rules on Containers with secondary flavor. All are distinguishable on material grounds. Each involved a boycotted product (1) which included as an integral phase, work not previously performed within the unit, and (2) which was related to a technology or operational method developed by employers having no relationship with the contracting unit. A claim for work as against such outsiders seeks to regulate the use by outsiders of their own technology and reduces the status of the contracting employer to a stance of neutrality. Unlike the air conditioning modules, scrub sta-

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[40] See also *Retail Clerks Union Local 324, et al. (Federated Department Stores, Inc. d/b/a Ralph's Grocery Company)*, 235 NLRB 711 (1978).

tions and prefabricated pipes, containerization was a technological development originating within and expanded upon by the employers of those within the primary work unit represented by ILA, and it was these same primary employers that thereby sanctioned a loss of work historically performed by ILA deepsea labor.[41] The Rules on Containers, insofar as an attempt to regulate a job eroding technology effected by their own employers, are far more germaine to the primary work unit than the disputes in the above cited cases.

Equally without merit is the claim that the stripping and stuffing of containers has been integrated into an intermodal system of freight transport so as to defeat any legitimate claim for this work by ILA. In this connection, it is noted that the 50 mile rule is narrowly tailored to the stripping and stuffing of containers. No other work is sought. As was true in *National Woodwork, supra,* the work in controversy herein, was performed historically at the piers by deepsea ILA longshoremen, and elsewhere by either truckers, warehousemen, or consolidators, at inland points. Just how this work loses its identity within the intermodal system is not articulated. There is no *inseparable* integration of these tasks with other labor functions or technology. To the contrarry, consolidators and NVOCCs have subcontracted the very work to be performed on the piers under the Rules on Containers, and it is difficult to imagine clear evidence that the boycotted service possesses a separate limited identity which unlike the labor input into the products boycotted in the *Associated General Contractor* line of cases, is subject to independent performance at a number of locations, under conditions which would fail to defeat intermodal maritime transportation.

Furthermore, it is difficult to perceive clearly the existence of a so-called integrated transport system. The

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[41] Cf. *Retail Clerks Union 770, et al., (Hughes Markets, Inc.),* 218 NLRB 680, 683 (1975).

Rules have been enforced against NVOCCs, consolidators, warehousemen, and motor carriers. While there are exceptions, most of the latter perform separate functions within the surface-to-sea transport system. They, together with freight forwarders (surface and marine), steamship carriers, and custom house brokers provide important services to shippers and importers engaged in foreign trade. However, the economic personality of the industry is not ossified into a single mold.

Thus, though freight forwarders (or custom brokers in the case of imports), consolidators, trucking companies, NVOCCs, and warehousemen may all be involved in a single shipment in seaborne trade, it is also possible that *none* might be involved. For private shippers, with capacity to prepare their own documentation and to provide transfer to the piers by private surface conveyance may deal exclusively with the steamship company or its port agent. Others may utilize public trucking concerns, warehouses, freight forwarders, NVOCCs, or consolidators, or any combination of these individual operators. With the exception of the steamship company, all employing entities within the intermodal system are dispensable. Hence, the quality of inseparability which existed in the new products considered in the *Associated General Contractors* line of cases is lacking in this proceeding, and accordingly, the challenge to the Rules based thereon is deemed nonmeritorious.

b. Do the Rules Seek Extra-Unit Work Not Created by Containerization

In *National Woodwork, supra,* the Supreme Court expressly reserved on ". . . the questions which might arise where workers carry on a boycott to reach out to monopolize jobs or acquire new job tasks when their own jobs are not threatened by the boycotted product." 386 U.S. at p. 630-631. Nonetheless, grievances seeking work historically performed by others which in no fashion was

created by the immediate employer's action, plainly raise issues beyond the primary work unit and are subject to resolution solely through secondary pressure. In other words, the claim for jobs which bear no causal nexus to the loss of work in the contracting unit, entails an underlying dispute alien to the contracting employers, but addressed to others who employ non-unit personnel to perform identical job tasks. In such instances, primary employees are not subject to ". . . the threat of displacement by the banned product or services. . . ." 386 U.S. at p. 644.

Extension of the boycott prohibitions in such cases not only is in harmony with governing principles, but is salutory in protecting the public against industrial warfare of an irreconcilable nature. For example, the records herein attest to the fact that longshoremen were not the only casualties of the container revolution. A loss of work was also sustained among truckers and offshore dock workers. Yet the work of loading and unloading cargo is functionally indistinct whether the cargo unit be a container, tandem trailer or vessel's hold, and labor organizations representing the offshore employees also have a statutory right to protect their traditional work through collective bargaining. Thus, competing claims may arise through separately negotiated agreements. Dilemmas are avoided through the above interpretation of the work preservation doctrine since controlling effect is afforded to the traditional practices within segments of the affected industries, and historic work patterns not established by the new technology are frozen and protected against raid by other labor organizations.

In *Local 1976, United Brotherhood of Carpenters* v. *Labor Board* (*Sand Door*), 357 U.S. 93, 100, the Congressional purpose underlying the prohibition on secondary boycotts was described as ". . . aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread,

and . . . dangerous practices of unions to widen that conflict. . . ." That end is achieved by deeming secondary, attempts by employees to reach out in compensation for their own job losses by displacement of other employees who have performed substantially identical work historically and without benefit of the causes of displacement in the primary work unit.

The Board has in effect adopted just such a view. Thus, in *Local Union 282, affiliated with the International Brotherhood of Teamsters, et cetera, (D. Fortunato, Inc.)*, 197 NLRB 673, a Teamsters Local had negotiated a provision requiring the driving of trucks to, from or on construction sites to be performed by employees covered by the agreement. The effect thereof was to impede access to job sites by trucks driven by employees of signatory suppliers and subcontractors, who were beyond the primary work unit. In finding that the agreement embodied an unlawful secondary objective, the Board reasoned as follows:

> Finally, we also reject Respondent's argument that the work covered by the clause is, in any event, "fairly claimable" by the unit employees since it is similar to, and requires like skills as, the work which unit employees now and traditionally performed. As already indicated, the driving work which the unit employees here perform is considerably more limited than that which they seek to preserve. The fact that the driving of one truck may well be similar to, and require like skills as the driving of any other truck does not persuade us that all driving work is therefore "fairly claimable" by a unit of drivers.

Thus, the inquiry herein does not end simply because the ILA lost work due to their own employer's technology, and the Rules merely restore to the unit, work traditionally perform by ILA. One more element is required before the Rules might be condoned as a legiti-

mate work preservation agreement; namely, that the work claimed is limited to that created, at least substantially, by containerization. Thus, if the Rules simply seek to restore work distributed to offshore employees by containerization, the ILA had a legitimate right to restrict the technology developed by the steamship companies to reclaim or preserve that work. On the other hand, to the extent that the Rules seek to compensate longshoremen for losses at the expense of inland employees whose jobs did not derive from containerization, a proscribed "work acquisition" objective would attach. This determination requires assessment of the economic personality of the various segments of the transport industry affected by the Rules; namely, consolidators, including NVOCCs and their subcontractors; warehousemen; and motor carriers, engaged in container processing within the 50 mile port area. The examination of these operations will place emphasis on the work they performed before and after containerization, and whether such work is independent of, and noncompetitive with, that provided historically by the contracting employers.

(1) *The Non-Vessel Operating Common Carriers by Sea.*

The NVOCCs may well be the principal beneficiaries of the container revolution. They operate subject to the jurisdiction of the Federal Maritime Commission, and in essence are brokers, engaged in the transportation of seaborne cargo on behalf of shippers pursuant to their own tariffs filed with the FMC.[42] They neither operate at piers, nor employ ILA labor. They solicit their own business and provide no direct services directly to the steamship companies. However, as they do not operate

[42] The NVOCC is required to file tariffs with the Federal Maritime Commission and to submit for review by that agency all agreements, fixing rates or otherwise providing for restrictions of competition among person subject to FMC regulations.

or own ships, they are completely dependent on steamship companies for this aspect of their service.

Although the services provided by the NVOCC to shippers are, in the main, similar to those extended by ocean freight forwarders and custom house brokers, the NVOCCs have the advantage of being able to issue a single bill of lading covering surface and seaborne transport. In addition, they assume single carrier responsibility under that bill of lading from point of shipment to destination.[43]

The importance of offshore consolidation and the NVOCC increased measurably by containerization. However, such operators contributed nothing in terms of capital investment to the development of that technology. Indeed, it is entirely possible to operate as an NVOCC simply with office space, a telephone, a typewriter, writing paper, a pen and pencil. Good contacts are also helpful. However, a blue collar work force is entirely unnecessary, as the functions of surface transport and freight handling may be performed in their entirety by subcontractors.[44]

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[43] The freight forwarder, who is not an NVO, historically and at present provides many of these services to shippers. Ocean freight forwarders are licensed by the FMC, but may not issue a single, through bill of lading and assume no responsibility for cargo while in transit. Unlike the NVO they do not stand in the position of the shipper *vis a vis* surface and marine carriers, nor do they stand in the position of carrier in relation to the shipper. The freight forwarder on export, and the custom broker, on import, are the agent for the shipper, and may arrange for inland and marine transportation of cargo to and from the pier as the case may be, while preparing all documentation necessary for the import or the export of cargo whether it be break-bulk, bulk or containerized. The freight forwarder and custom brokers are at least partially compensated by the steamship companies on a commission basis. The NVOCC receives no form of compensation from the steamship company.

[44] For example, Dolphin Forwarding, Inc. operated entirely on this basis. San Juan Freight Forwarders utilized subcontractors exclusively in certain ports.

The NVOCCs are almost exclusively engaged in the handling of LCL cargo on behalf of small shippers, who otherwise would be required to ship overseas at the higher break-bulk rates appearing in the tariffs of the steamship companies. With respect to freight handling operations, the NVOCC will itself make arrangements, with the shipper for the delivery of freight to a break-bulk station either operated directly by the NVOCC or through a subcontractor in its behalf. At that point, the cargo is sorted and then stuffed, along with break-bulk of other shippers into a single container before delivery to the pier for loading aboard ship.

Among the services provided by NVOCCs for shippers are the following: (1) booking space aboard ocean-going vessels; (2) providing pick-up and/or delivery services for shippers and consignee; (3) inspection, measurement, weighing cargo, and checking cargo to reasonably ascertain that it is the correct cargo as described; (4) separate cargo by destination; (5) assign containers to cargo, (6) stuff cargo into containers for maximum use of container, the safest means of packaging and sequential delivery; (7) seal the container; (8) deliver the container to the pier; (9) issue bills of lading; (10) completion of export documentation including shippers' export declarations, banking documents, and certificate of origin, and (11) advance inland freight charges and collect invoice charges.[45] It is not without significance that ocean freight forwarders, on export, and customs brokers on import, historically have performed many of these same services. There is also some evidence, that NVOs on instructions from a shipper will provide specialized services in the area of packaging and

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[45] See affidavit of Ernesto J. Sanjurjo, dated January 8, 1981. Joint Exhibit 1, p. 712, 714.

that they also have some special capacity to trace shipments for the customer while in transit.[46]

On behalf of the NVOCCs, it is argued that services they provide cannot be duplicated at the piers. It is clear, however, that in many instances NVOCCs do not directly supervise employees engaged in freight handling, but utilize independent contractors in this respect. Furthermore, the breadth and quality of cargo handling services that could be provided at shipside is more a function of that which steamship carriers and marine terminal warehousemen are willing to provide to break-bulk shippers, or indeed, to NVOCCs, than of any unique expertise held by inland operators.

The impact of containerization upon the development of business for the NVOCCs has been dramatic. As stated by Poul Rosander, manager of Wilson Container, Co., Inc., which operates in part as an NVOCC:

> "All the services which I have described have been made possible by containerization, and the development of our business was primarily the result of the

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[46] See affidavit of Poul Rosander, dated January 21, 1981. Joint Exhibit 1, p. 695. In his affidavit, Rosander describes work of two customers not suitable for performance at the piers. Neither in my opinion necessarily involves classical NVOCC work. The first relates to imports of FSL containers loaded with paper rolls from Sweden which are susceptible to damage from weather and mishandling. As I construe the affidavit, the work performed by Wilson Container Co., Inc., in connection with those paper rolls was not in the capacity of an NVOCC, but as a warehouseman. Thus, the Rules on Containers as they apply to LCL cargo, would not impede this warehousing function. The second relates to the export of magazines and paperback books to Scandanavia. In this instance, at Wilson's facility, the magazines and books are sorted by destination, palletized, with the palletized loads, then shrink wrapped before stuffing. The argument is made that there are no facilities at the pier enabling the sorting of these goods by hand and the shrink wrapping of them before palletization. Here again, however, the observation seems irrelevant, since FSL, rather than LCL cargo is involved.

introduction of containerization into the port of New York." Joint Exhibit 1, pp. 696-697.

To a large extent, this developing sector of the transportation industry was aided and abetted by the steamship companies, themselves. Thus, though the tariffs issued by the latter throughout the development of containerization advertised rates for shipment "pier-to-house" and "pier-to-pier" transport, as well as rates for break-bulk shipment, all of which would require ILA stuffing at the piers, there is evidence that certain steamship companies at the same time discouraged small shippers from dealing directly with them. Thus, there is evidence that shippers were referred by steamship companies to NVOCCs for the shipment of break-bulk or LCL freight.[47] Furthermore, financial inducements afforded to NVOCCs through the tariffs issued by steamship companies persistently invited charges by ILA that certain steamship companies were undermining the work of longshoremen by providing financial inducements for the avoidance of containerization at the pier. The adverse impact on ILA of these discounts, called the FAK rates, was acknowledged by various representatives of NVOCCs. Thus, as averred by Victor Santos, general manager of San Juan Freight Forwarders, Inc., an NVOCC:

> . . . The rate structure of the steamship companies is such that it discourages the handling of small shipments and the consolidation thereof. Practically, the steamship company rates and charges constitute an embargo for this type of traffic.
>
> In effect, the charge by the NVOCC for a single shipment is less than the charge which would be incurred by a shipper, if the shipment was handled

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[47] See e.g., affidavit of J.S. McCallie, dated October 10, 1980. Joint Exhibit 1, p. 527, 530.

by the steamship company without the intervention of the NVOCC.[48]

An intent on the part of certain steamship companies to divert work from the docks to inland points by virtue of its tariffs is also evident in a statement of Rodolfo A. Catinchi, manager of the Puerto Rican office of Transconex, Inc., an NVOCC, to the following effect.

> . . . In the earlier stages of containerization, NYSA also recognized the longstanding tradition of consolidating cargo off the docks. This is clearly reflected in the Federal Maritime Board tariffs filed by the NYSA member shipping companies handling containers in the New York-Puerto Rican trade prior to 1959. These official documents show that off pier consolidation work was not only allowed, but actually was *mandatory* in order to qualify for the tariff rate under which consolidated containers have been and are shipped — namely, Freight-All-Kinds.

Though, perhaps, spurned by the steamship company, the NVOCC is a competitor of the latter in connection with the containerization of break-bulk cargo. For the NVOCC, like the custom house broker and the freight forwarder, is merely a middleman who provides assistance to shippers for compensation as an indirect carrier with no operating equipment. However, the NVOCC bears the nomenclature of a sea carrier and is regulated by the agency having jurisdiction over elements of the shipping industry. They hold themselves out to the public as a source of seaborne transport and charge rates, derived from tariffs issued by steamship companies, themselves. Hence, they vie with the steamship companies for cargo services that the latter also advertise through published tariffs.

Though the steamship companies may well believe that NVOCCs can provide LCL services to shippers with

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[48] Joint Exhibit 1, p. 717, 720.

greater efficiency and profitability, it remains that the former have through collective bargaining contractually bound themselves to preserve certain break-bulk work at the piers for longshoremen. In recognition of said obligation, many steamship companies have developed LCL container stations at dockside, where break-bulk cargo is received, sorted and stuffed or stripped into containers by deepsea ILA labor. Indeed, certain such facilities are maintained by steamship companies whose fleets are exclusively composed of containerized vessels.

Thus, there can be no question that the steamship companies possess the capacity to handle LCL cargo at pier side and to abide by their obligations to ILA under the Rules. To this extent, the NVOCCs and steamship companies are competitors, and the NVOCC's stuffing and stripping of containers owned or leased by the former is pursuant to a reallocation of work from the piers to offshore facilities created virtually in its entirety by the development of containerization.

Evidence that the consolidators unitized cargo prior to or during the era preceding the Rules does not alter these economic truths. Such evidence does not disclose that such offshore consolidation occurred, in more than trifling amounts, with equipment furnished by steamship companies. For the unitization of cargo beyond the piers on pallets, in trailers, railroad cars or boxes owned by shippers or their agents, is not within the work sought by the Rules on Containers, nor claimed by the ILA as part of their historic work jurisdiction and hence is not suggestive of a relevant, competing offshore work tradition.

Insofar as the Rules claim the offshore stripping and stuffing performed by NVOCCs within 50 miles of the port, it constitutes a rational effort to return to the piers, work diverted by inducements and a technology promulgated by signatory steamship companies and ma-

rine terminal operators. As such, the work performed by the NVOCCs, or their agents, to the extent covered by the Rules, was fairly claimable and failed to denude the Rules of a primary objective for purposes of Section 8(e) and 8(b)(4)(A) and (B) of the Act.[49]

In reaching this conclusion, I have considered the claim made on behalf of the NVOCCs that the threat of displacement by the boycott of off pier consolidation is too remote to support a primary objective. In this regard, it is argued that the NVOCCs have actually increased traffic to the piers by attracting LCL shippers who would not send loose cargo to the piers. While undoubtedly, there are some LCL shippers that would spurn export trade, it remains a fact that others have not, and that deepsea ILA longshoremen at pierside LCL stations continue to service this very market to date. Beyond that, the arguments made in this respect are highly speculative and certainly the instant records furnish no basis for an inference that ILA deepsea labor has not lost tonnage in substantial quantities to the NVOCCs.

Also without merit is the claim that the 50 mile rule, to the extent that it focuses on NVOCCs within the 50 mile zone, is lacking in rational foundation. As should be evident from the discussion previously set forth, this rule evolved from compromise in the face of crippling strikes. It was designed to preserve for the ILA 20 percent of the containerized freight based on tonnage ratios existing at the time in the Port of New York. It might

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[49] The above conclusion applies with equal force to any offshore consolidators, which are not NVOCC's, but still engage in the stripping or stuffing of LCL containers. Many, if not all, of these consolidators have become NVOCCs. They, as well as the NVOCCs today, may continue to consolidate cargo without ILA interference, so long as the equipment utilized is neither owned nor leased by the direct employers of deepsea ILA labor. However, they as a matter of practical reality are situated identically to the NVOCCs insofar as the above issues are concerned, and the conclusions reached are equally applicable in their case.

also be observed that there is some logic to the notion that if consolidation in containers is to be performed within the port area, it just as conveniently could be performed on the pier by longshoremen. In rejecting this contention, the admonition of Mr. Justice Marshall with respect to the scope of the remand is called to mind:

> Thus, in judging the legality of a thoroughly bargained and apparently reasonable accommodation to technological change, the question is not whether the Rules represent the most rational or efficient response to innovation, but whether they are a legally permissible effort to preserve jobs.[50]

With respect to the claim that the 50 mile rule is illogical to the extent that it exempts the same work by NVOs performed outside the 50 mile area, it is noted that compromise may at times be arbitrary. In this instance, it is not entirely clear as to whether all NVOs could effectively maintain their competitive posture by functioning beyond the port area. Thus, the 50 mile rule in this sense, may be considered as a deterrent to the threat that NVOCCs present to the traditional work of longshoremen.

While as against NVOCCs and consolidators handling LCL containers within the 50 mile area, the Rules on Containers may not be faulted on work preservation grounds, I would note that not all of the latter are engaged exclusively in that capacity. Thus, trucking operations and/or warehousing operations have established NVOCC divisions, or otherwise engage in LCL container consolidation in conjunction with their performance of other freight distribution services. Irrespective of the findings to be made below with respect to these surface industries, the conclusion heretofore reached is to the effect that a motor carrier or warehousemen, *is subject to legitimate application and en-*

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[50] 447 U.S. at p. 511.

forcement of the Rules, to the extent that the Rules survive the right of control test, and to the extent that such carriers or warehousemen also perform LCL consolidation work allocated under the Rules to deepsea ILA labor.

(2) *The Motor Carriers*

The findings made above with respect to the NVOCCs relate to their status as indirect ocean carriers providing services essentially within the seaborne sector as distinguished from the surface, leg of cargo transhipment. Technically, under the ocean bill of lading the container's seaborne journey does not end, at least, until stripped by the NVOCC or its subcontractor. On the other hand, a container released to a motor carrier for delivery to a bona fide warehouse or shipper, generally assumes the character of surface freight and no longer is within the realm of marine cargo. Generally, it is within this framework that the work claimed under the Rules affecting motor carriers and warehousemen must be assessed. However, containerization has allowed certain segments of the surface sector to make incursions upon traditional dockside work in a manner unsupported by offshore work traditions. It shall be recognized that in such instances, ILA has the right to protect their historic work jurisdiction by regulating access by others to the technology developed by their employers.

Motor carriers, historically, have maintained terminals or freight stations in the port area. They may offer long-haul interstate carriage service or intrastate and local cartage service. Generally, with respect to marine cargo, it has been the business practice of motor carriers within their operating areas to pick up export frieght at a shipper's facility for delivery to a seaport terminal, and on the import side, to pick up cargo at the seaport terminals for inland delivery.

On the import side, prior to containerization, break-bulk cargo picked up at a seaport terminal by a motor

carrier would only be delivered *directly* to the importer if the entire load was consigned locally. If destined beyond the port area or to multiple inland locations, the cargo was delivered to the terminal or freight station where it was unloaded. The break-bulk cargo was then reloaded into over-the-road equipment for delivery to a single consignee beyond the geographic area, or if destined to a number of such consignees, the cargo would be sorted and consolidated according to geographic location with other cargo, and then reloaded for delivery. The practice whereby cargo was returned to freight stations for off-loading, sorting, segregating, and reloading by destination, was a practice which possessed no exclusive relationship to marine trade. Thus, cargo shipped purely on an interstate or continental basis by motor truck, or a combination of railroad and motor truck, is subject to the same handling at terminals and truck stations.

The testimony and arguments on behalf of the motor carriers that containerization did not change these practices seems logically founded and is persuasive. The basic cargo unit in the motor carrier system is the truck or trailer load. With the introduction of containers, the offshore drivers and their helpers, in most ports lost work themselves, in connection with truck loading operations at pier side. In addition, dock workers employed at trucking stations by motor carriers, after containerization, lost work in connection with FSL containers delivered directly over-the-road to warehouses, consignees, or interlining trucking stations, located beyond the geographic port area. Furthermore, it does not appear that job categories at trucking stations increased in consequence of containerization.

Specifically the Rules on Containers, as thus far applied, have interdicted the practice by the motor carriers of "short-stopping" freight within the 50 mile area. By virtue of this practice, FSL containers are stripped at

truck stations and terminals within the geographic area covered by the Rules for a variety of reasons associated with the economics of *surface* transportation. Thus, containerized vessels handle containers of various size including those 20 foot, 35 foot, and 40 foot in length. Over-the-road tractor-trailers are up to 45 feet in length, and therefore have a capacity exceeding that of the modern containers. Interstate carriers will upon occasion strip the smaller containers, consolidate the cargo they contain with other goods destined for the same area and load the consolidated cargo into a 45 foot tractor-trailer. In addition, many interstate carrier systems interchange trailers at inland points for use within a multistate system. Containers have no utility within that system and if transported over the road, would have to be hauled empty back to the port area on a "dead head" run. Short-stopping may also occur because containers may not have been loaded in a safe manner or in compliance with State laws regulating safety of operation on the highways. Other grounds for short-stopping include the fact that motor carrier is required to pay *per diem* charges on containers, a practice which is wasteful while empty trailers sit idle and are subject to utilization without additional operating cost.

Based on the foregoing, it appears that the practice of short-stopping is rooted in traditional motor carrier transport cargo handling procedure, which is performed by motor carriers for their own benefit and convenience. To the extent that containers are handled for such purposes, and not under direction or for the benefit of shippers, consignees or their agents, short-stopping has no relevance to the marine leg of the intermodal network. Although skills utilized therein are indistinct from those of deepsea longshoremen in the performance of their traditional duties, it is work assumed for a different purpose, and in a different segment of the transportation industry. Short-stopping is simply a carrier oriented, as

distinguished from consumer oriented service, and as such neither competes with marine cargo handling nor amounts to a subterfuge to oust longshoremen of their traditional work. To this extent, upon delivery of a container to a motor carrier, the seaborne leg ends, the container becomes the substitute for the trailer or van,[51] and work beyond this interface was neither created by containerization nor does it make inroads on that traditionally made available to deepsea ILA labor by marine operators.

On such facts, it is found that by application of the Rules to "short-stopping" of import cargo to carriers purely engaged in surface, motor carrier operations, the Rules seek to allay a controversy not with the immediate employers of ILA labor, but with motor carriers in a distinct segment of the transportation system, that have chosen to assign comparable work to their own employees, who have traditionally performed it, even though said offshore work pre-existed and was not created by containerization. Such work was not fairly claimable by the units represented by the ILA, and hence to this extent the Rules carry a proscribed secondary objective

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[51] Merit exists in the observation by counsel for ATA-TMTA that containerization produced an equipment change which is "chameleon-like" as it passes through various segments of the transport industry. Further, if practices within each industry are to be given full effect in the assessment of whether a particular negotiated agreement is germain to issues within the primary work unit, one must look at the container in terms of the cargo unit it displaced in each sector of the transport system. Thus, while the container may properly be viewed as the equivalent of the hold of the ship, when serviced by those traditionally engaged in the maritime industry, this analogue may not be used to eclipse traditional practices in other industries not influenced by the same technology. Thus, when one considers traditional business practices in the surface transport industry, it seems only logical that the container, as it passes from marine stage of the journey into the hands of traditional surface conveyance, be treated as the equivalent of the trailer or truck load.

within the ambit of Section 8(e) and Section 8(b)(4)(B) of the Act.

Beyond that, motor carriers also have stuffed FSL containers for export within the port area. For example, since containerization, certain interstate truckers have stuffed FSL containers at their port area truck stations. Thus, in order to avoid inconvenience attendent in the delivery of empty containers to shippers so as to enable stuffing by the customers' employees and immediate transport to the pier, such cargo will be hauled in trailer loads to the truck station, where it will be stuffed into FSL loads and delivered to the pier.[52] Evidence also exists that at least one carrier stuffed all export FSL containers at its port area truck station because its tractors were incompatible with and were damaged by containers.[53] Although the existing cases do not reflect application of the Rules on Containers to this practice, it is one which would be precluded by their literal terms.

While the question presented here is close, on balance, the stuffing of outbound FSL containers by entities acting purely in the capacity of motor carriers, not as a direct service to customers, but to facilitate their own transport needs, would seem incidental to the movement of surface of freight. As such, the FSL container handling would fall within the framework of traditional motor carrier practice, relative to the preparation of freight for delivery from port trucking station to the piers, as well as the conversion of cargo from over-the-road to local type equipment. If this work is not offered to the public as an available service, or performed under an ocean bill of lading, or on behalf of an NVOCC, ocean freight forwarder or anyone else engaged in services offered by employers of ILA labor, it bears an insufficient relationship to work performed within the marine leg

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[52] See Joint Exhibit 1, pp. 318, 329.

[53] See Joint Exhibit 1, p. 702.

of the transport system, to represent work fairly claimable by deepsea ILA labor. As is rue of "short-stopping", application of the Rules in this context is viewed as an attempt to offset job losses on the piers by disrupting inland work patterns not involving work lost by longshoremen in consequence of containerization. The Rules are unlawful under 8(e) to this extent.[54]

(3) *The Warehousemen*

The offshore public warehouse has traditionally performed separate functions in the surface distribution phase of domestic and foreign commerce. Freight is not always subject to immediate dispatch from shippers and to importers without necessity for intermediate storage. The public warehouse has filled these needs historically while providing related services as part of a surface system of distribution.

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[54] Reconciliation of findings heretofore made is necessary with respect to certain consolidators of LCL freight that might possess privately held trucking capability. While it is possible that all of these concerns have become NVOCCs and subject to lawful application of the Rules, those that may still exist and the possibility that similar operations might reappear present a serious threat that traditional maritime work will be diverted to such operations under the guise that consolidation of LCL containers by such firms is within the surface segment of the transport industry. Such a view is enhanced by evidence that, prior to containerization, small trucking firms picked up small loads of break-bulk locally, which were then sorted and consolidated by destination, for reloading and delivery to the piers. Nonetheless, the Rules in this instance are considered legitimate. A genuine potential for subversion of an otherwise legitimate work preservation arrangement calls for application of a rule of reason if the balance between collective bargaining and restraints on secondary activity is to be maintained. If the holdings herein with respect to NVOCCs are affirmed, not only is it probable, but likely that consolidating-trucking firms will fall heir to longshore work lost to marine interests by virtue of containerization. On balance, full interplay of the Act warrants the conclusion that ILA be permitted to enjoy the protection of the Rules as against combined NVO-trucking operators and truckers who offer container stuffing or stripping to the public as an available service.

Through the 1973 Dublin agreement, the Rules first adopted provisions specifically restricting the handling of FSL containers by offshore warehouses. In 1975, those Rules were revised to, in effect preclude warehouses from stuffing export containers within the 50 mile area, and from stripping import containers within the geographic area, unless the cargo is:

(1) Warehoused at a "bona fide public warehouses";

(2) The consignee pays the normal warehouse charges for a minimum period of 30 or more days;

(3) The cargo is stored for a minimum of 30 days; and

(4) The warehousing occurs in the normal course of business for the qualified consignee with title to such goods not being transferred during the term of storage.

Prior to containerization, import cargo would be picked up at the piers by common carrier, delivered to a warehouse, where a trailer or truck would be unloaded, with the cargo sorted, segregated, palletized, and placed in a designated storage area. Depending upon the consignee's needs, the cargo would be removed from the warehouse, distributed, or delivered. Thus, the public inland warehouse has always provided an intermediate freight distribution service whereby cargo could be stored for a term dictated by the owner's market demand.

To this extent, warehousing practices did not change after containerization. Instead of stripping truck-trailers upon arrival at the warehouse docks, the container was stripped. In this sense, the container afforded no change in the warehousemen's method of handling inbound freight, but simply reflected a change in equipment through which the truck-trailer was supplanted by the container.

The container handling services afforded by warehousemen as outlined above are and have been integrated into a surface system of transportation, which was not created by containerization, and poses no threat to historic work jurisdiction of ILA. As was true of motor carriers, the Rules on Containers as applied to such historic aspects of off pier work constitutes a work acquisition arrangement contemplating seizure of jobs on behalf of ILA to obtain traditional work of others to compensate for their own unrelated job losses.

Nonetheless, the Rules do not seek in *specific* terms to dispossess warehousemen of the container work performed in conjunction with these historic warehouse functions. And indeed some form of contractual restriction upon warehousemen, is not totally alien to legitimate ILA work preservation of objectives. For warehouses have been utilized by shippers and their agents *solely* to perform stripping or stuffing under conditions enabling avoidance of the high cost of performance by ILA at dockside. Provision of such services by warehousemen is tantamount to the establishment of offshore container stations in competition with those at dockside and constitutes an incursion on ILA labor not justified by pre-container warehousing practices. The Rules on Containers may legitimately extend to such practices.[55]

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[55] As heretofore mentioned, practical problems emerge because of the lack of absolute separation of functions among operations within the surface transport system. It has been indicated that some motor carriers combine freight consolidation functions. It is also a fact that motor carriers may also provide warehousing services. Under findings heretofore made, some stripping and stuffing of containers by motor carriers is pursuant to a historic offshore practice confined to that industry and beyond legitimate application of the Rules. However, an opposite result may follow where the identical service is performed by warehousemen. The varied conclusions in this regard, necessarily will encourage a diversion of work to combined trucking/warehouse operations, or for that matter to truck stations, to evade the legitimate reach of the Rules and to undermine traditional ILA work jurisdiction. Such readjust-

The ILA's legitimate concern with respect to offshore warehousing practices is also supported by the fact that time delays in shipment receipt and dispersal is not exclusively an offshore problem. Marine cargo received at the docks is not always immediately transferrable to surface carriers, and outbound cargo delivered to the piers, often must wait for the arrival of a ship. In consequence, marine terminal operators maintain terminal warehouses, where cargo is stored on a *short term basis* pending delivery to carriers or loading aboard ship. With respect to these marine terminals, ILA labor has historically sorted, checked, and handled such freight. Thus, there is an overlap between the capacity of maritime employers and surface warehousemen to provide a similar service at least with respect to short term storage.

Basically, the distinction between the marine terminal warehouse and the inland public warehouse lies in the fact that former represents a resting place pending loading of the vessel and/or release to surface carriers as an incident to marine import or export. On the other hand, inland public warehouses are essential links in a market distribution system which lies on the inland side of the interface between marine and surface carriers.

Preservation of this distinction, insofar as it allocates container handling between the separate industries, constitutes a legitimate subject for regulation by ILA through collective bargaining. By virtue of the Rules, such an attempt is apparently reflected in the 30 day clauses, forming the exemption applicable to bona fide warehouses. These restrictions were included in the

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ments, however, to the extent detectable, will not be effective to frustrate the protective scope of the Rules. For the traditional inland motor carrier practice which is insulated by Section 8(e) from lawful intervention of the Rules is strictly limited, and extends only to those operators engaged purely in motor carrier functions, who strip and stuff containers at their own expense, for their own convenience as motor carriers, rather than for the convenience of shippers, consignees and their agents.

Rules to prevent warehouses from being used as "drop points" for stripping and reloading immediately onto trucks.[56] However, a serious question exists as to whether they cut too deeply into traditional warehousing practices. Thus, the 30 day charge feature is not unduly restrictive in this sense because warehouses as a matter of practice impose a minimum monthly charge.[57] Accordingly, this enforcement mechanism affords ILA labor no advantage over work performed offshore traditionally by employes of bona fide warehousemen.

On the other hand, consignees of imported goods often utilize inland warehouses to inventory imported goods, as against flexible and unforeseeable market demand. Such practices permit immediate delivery and avoid the delays encountered through a shipment from point of origin on sale, or customer order, method of doing business. It is an integral part of the surface distribution system not generally, duplicated at portside marine operations, and container handling in conjunction therewith, is akin to the historic unloading of trailers at said site. Application of the ILA's 30 day storage limitation so as to preclude a consignee's access to warehoused goods in container-size lots is often incompatible with the consignee's need to meet consumer demand, and enforcement of that restriction in such a context serves as an impediment to inland work practices which bear no relationship to services customarily or historically available at pier side.

As indicated, however, offshore warehouses do compete with those operated at marine terminals. Container handling by the former, in the capacity of stripping station or in direct competition with the marine warehouse for

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[56] See *Hill Creek*, transcript, p. 232, testimony of John Rusta.

[57] See *Hill Creek*, transcript, p. 314, testimony of Vincent D'Arella, Jr.; p. 324, testimony of Lawrence J. Doherty; p. 328, testimony of George Bacon. See also *Terminal*, transcript p. 506, testimony of John Menzies.

short-term storage, is legitimately with the category of work subject to preservation by the ILA. Since the distinction between container handling which is and which is not rightfully claimable by ILA, insofar as warehousing is concerned, to a great extent is a function of time, the 30 day storage rule is not wholly inapposite to ILA's legitimate claim insofar as it extends to cargo lots no part of which is received by a warehouse for indefinite holding. In this posture, the 30 day storage rule seems a logical basis for distinguishing the historic warehouse function from that which is merely an inland container station established to erode ILA historic work jurisdiction.

One possible example of threat to ILA from the appearance of such cargo handling stations, is evident from the New York-Philadelphia experience in connection with the importation of frozen meats. As a general proposition, marine terminal warehouses do not exist in sufficient quantity to provide *all* importers with market oriented distribution services. Prior to the mid-1970s, however, this was not true in the case of the importation of frozen meat. Historically, the Port of New York was the predominant port of entry for such products, with refrigerated containers or "reefers" being stripped at pier side at cold storage warehouses by deepsea ILA labor. As containerization matured inroads on this practice began with the appearance of inland cold storage warehouses in the Port of Philadelphia. However, this pattern exploded in June 1979 when a 10(1) injunction issued against the Rules in that Port. As heretofore indicated, the latter replaced New York as the principal port of entry for frozen meat, and ILA handling of "reefers" at pier side was reduced by 80-90 percent in both ports. This dramatic incursion on ILA man-hours was a direct by-product of containerization and the spread offshore of cold storage warehouses in Philadelphia during the mid to late 1970s, a development which was not supported by a separate inland work tra-

dition. Five operators of such offshore warehouses testified in *Hill Creek*. From their testimony it appears that the first container shipment was handled in a Philadelphia warehouse in 1974, three others received their first shipments in 1975, one in 1976, and the fifth, Hill Creek, in 1978. Here, the conclusion is warranted that the offshore cold storage warehouses in Philadelphia had a dramatic eroding effect on the work opportunities in the primary unit while unaided by a pre-containerization offshore tradition. Accordingly, the 30-day rule insofar as invoked against that practice, was a legitimate attempt to preserve the historically separate pier front, warehousing tradition enjoyed by longshoremen as against a new source of inland competition nurtured by containerization.

The work preservation objective would also exist with respect to restrictions upon certain practices of warehousemen in conjunction with export containers. The Rules insofar as they affect the export of FSL cargo provide no exceptions, requiring that all to be stuffed within the geographic area, be stuffed at pier side by deepsea ILA labor.

There is evidence that after the advent of containerization, public warehouses, on behalf of shippers, have received trailer loads of cargo from a single shipper and on behalf of the shipper stuffed that cargo into containers without performing any other specialized warehousing service. See e.g., *The Terminal Corporation*, 250 NLRB No. 4.

There is little in the way of evidence suggesting that such a practice existed prior to containerization. The basic surface cargo unit during the pre-container era was the trailer load. The shipper would simply load the carrier's trailer, for direct delivery to the piers. Unless specialized warehouse services were required, involvement of a warehouse in routing would simply add needless expense and time loss.

With certain exceptions, the stuffing of FSL containers by warehousemen, was made practicable solely by virtue of containerization.[58] Thus, warehousemen with access to containers may act as middlemen, whereby shippers need not obtain empty containers and have them stand idle while paying per diem rates pending shipment, but may utilize stuffing facilities of such warehouses in the port area. Where no special services peculiar to the surface warehousing industry are provided or performed in connection with such activity, the work of stuffing the container could as easily be performed at pier-side with ILA deepsea labor. The ban of the Rules on such a practice effectively restores for deepsea longshoremen the work they performed with respect to the cargo prior to containerization when shippers of large quantities of goods delivered full trailer loads directly to the piers. Here again, warehousemen like the NVOCCs who stuff

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[58] Such an exception is evident in the historic operations of Mahon Express, Inc. Mahon for many years has provided warehousing services for certain retail chain stores, including Woolworth, K-Mart and Kreske, which have retail outlets in the Carribean. These retail chains obtain their inventories from a variety of manufacturers. Instead of maintaining a private warehouse for receipt of such deliveries, insofar as destined for the Carribean, these chains directed their suppliers to deliver to Mahon. The goods were segregated by Mahon and ultimately loaded into trailers prior to containerization for the delivery to the pier. Subsequent to containerization, Mahon's employees stuffed the cargo into containers for delivery to the pier. A further exception appears in testimony of Poul Rosander pertaining to the stuffing of books and magazines, requiring special processing at the warehouse operated by Wilson Container Co., Inc. See footnote 46, *supra*. Application of the Rules on Containers to such services would transcend any legitimate claim of work preservation. The service provided by Mahon and Wilson, though involved with exports, is an incident of traditional shore-side services, conventionally available through inland warehouses, which is not an essential preliminary maritime service. The ILA's claim for this work by virtue of the Rules on Containers is no more in support of fairly claimable work than in the case of importation of FSL cargo for holding and distribution by a full service public warehouse located within the port area.

such containers in the port area are engaged in direct competition with employers of deepsea ILA labor who themselves created the technology which fostered the offshore performance of this limited service. The Rules as applied thereto entail a legitimate work preservation objective.[59]

As should be apparent from the foregoing, the scope of the Rules as they apply to warehousemen is not susceptible to singular analysis, nor may they be branded with overarching legality or illegality on a facial basis. Intermediate cargo handling by warehouses is founded upon practices, traditions and methods of operation which vary and do not come to bear in unified fashion upon the rights of ILA to preserve its historic work. Like the problem, the solution is less than ideal. Nonetheless, the fact that the Rules do not always focus upon complex business practices with legitimacy is no more reason to foreclose ILA from protecting its historic work than to conclude that ILA should be licensed to monopolize jobs because other work may rightfully be sought as within the realm of "fairly claimable." Instead, the legitimacy of the Rules as they apply to warehousemen handling FSL containers must be resolved on a case-by-case basis, with particular emphasis being placed upon whether the application is in quest of work within the framework of a separate tradition peculiar to offshore warehousing, which has not been created by containerization and which is unrelated to traditional services available to the piers.

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[59] To the extent that public warehouses consolidate LCL freight in their own behalf or on behalf of an NVOCC or other consolidator, the Rules for reasons heretofore stated, if enforced against them, are consistent with legitimate work preservation objectives.

c. Has the ILA Abandoned Any Claims to the Disputed Work

The challenge to the lawfulness of the rules on grounds that the ILA abandoned its claim to strip and stuff containers is derived essentially from an alternative theory endorsed by the Board in support of the violations found in *Conex*, 221 NLRB 956. In this regard, prior to the opening of the hearing herein, the undersigned issued "Rulings on Offers of Proof," in which the abandonment issue was rejected as a viable line of inquiry in this proceeding.[90] Nonethless, the various charging parties persist in their contention that the ILA abandoned any claim to the stripping and stuffing of containers, when in 1959, it settled for premium payments in exchange for the steamship companies right to allow *all* containers to pass over the piers without stripping or stuffing by ILA. A variation of the contention is to the effect that since the ILA sought no relief from the offshore stripping and stuffing of FSL cargo prior to the 1973 Dublin agreement, it must be taken to have waived any right to negotiate such restrictions.

The Board in sustaining such a contention in *Conex*, at 221 NLRB 960, stated:

> Furthermore, assuming that ILA had a superior claim prior to 1959 to the stuffing and stripping work here in controversy, we believe, contrary to the Administrative Law Judge, that it abandoned that claim by its 1959 contract with NYSA. Thus, section 8(a) of that agreement provides that "Any employer shall have the right to use any and all type of containers without restriction or stripping by the union." Plainly, this language is designed to ensure that there would be no restriction on the handling of any type of container, including LTL or LCL containers. The only qualifications specified,

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[90] See ALJ Exhibit No. 4(b), pp. 12-14.

> which are contained in section 8(b) and (c), provide the *quid pro quo* for this concession. Section 8(b) provides for the payment of royalties on "containers" which are loaded or unloaded by non-ILA labor away from the pier. Section 8(c) requires that ILA labor be used to perform container work actually performed for NYSA members themselves, whether at their terminals or by their subcontractors. . . .

On review of that Decision, the United States Court of Appeals for the Second Circuit, by divided panel, enforced the Board's Order. However, the majority, limited their approval as follows:

> "We are not similarly impressed with the National Labor Relations Board's other reasons for its order, such as the alleged abandonment by ILA of its claims." [61]

Later the Circuit Court of Appeals for the District of Columbia in *I.L.A.* v. *N.L.R.B.*, (*Houff Transfer, Inc.*), 613 F.2d 890, pp. 910-911, ftn. 178 (C.A.D.C., 1979), had occasion to consider the question and addressed it as follow:

> "The Board apparently does not rely on this abandonment point in the instant cases, . . . In our view the abandonment point is without merit. We break no new ground when we characterize collective bargaiinng as "a constant and unending dialogue of powers." . . . As in any dialogue, the most appropriate response can not always be framed instantaneously. Rather, ideas generally develop over time; the best ideas may indeed require the longest gestation periods. Be that as it may, the crucial point here is that the dialogue over how best to assimilate containerization—and, more particularly, the work of stuffing and stripping containers in the

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[61] 537 F.2d 706 (C.A. 2, 1976).

port area—into traditional longshore work patterns has never ceased. . . . (T]he issue of containerization has been a key ingredient in ILA-Shipper relationships from the moment of its inception to the present."

"Further, the abandonment point ignores the possibility of recapturing work that, due to technological innovation or managerial initiative, has temporarily escaped from the bargaining unit. . . ."

"A variation on the abandonment theme is offered by Intervenor Houff Transfer, Inc., in the Baltimore and Hampton Roads case, Houff argues that the negotiated Royalty payment provision in the Rules represents a conscious choice on the part of ILA to accept that payment instead the work of stuffing and stripping FSL containers. . . . The argument is plausible only to the extent that abandonment took place with respect to FSL containers that go directly to their beneficial owners or to a point outside a 50 mile radius of the ports for stripping. The ILA has consistently proven antagonistic the idea that any container can be stripped or stuffed in the port area by other than ILA labor. This hardly amounts to abandonment, the royalty payment notwithstanding. . . ." [62]

While it is the duty of an administrative law judge to adhere strictly to precedent of the Board, such con-

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[62] On behalf of Charging Party Houff Transfer, Inc., it is argued that the above expression by the Court of Appeals for the District of Columbia rested upon "a *totally* erroneous factual *assumption*." It is argued that the Court, in rejecting the abandonment claim acted on the misapprehension that, prior to the 1973, the Rules contemplated that longshoremen would strip FSL cargo in the Ports of Baltimore and Hampton Roads. Contrary to Houff, it does not clearly appear that such factual considerations in any way influenced the Court, and in any event, the rationale of the Court transcends minor factual issues, in giving realistic effect to collective bargaining as a continuing process.

straints would not seem to apply here. In the wake of the adverse reaction by the Courts, there is no evidence that abandonment retains any vitality under Board law. The Board's pronouncements since 1975 with respect to the Rules on Containers fail to afford weight to such a concept.[63] Furthermore, although the question was not specifically addressed by the Supreme Court in *I.L.A.* v. *N.L.R.B.*, *supra*, the abandonment theory is difficult to reconcile with Mr. Justice Marshall's seeming endorsement of the view that assertion of a work preservation defense ought not be prejudiced by the fact that negotiated agreements might treat a problem in hesitant fashion. Thus, at 480 U.S. p. 505-506, it was stated as follows:

> One way to preserve the work of the employees represented by the union in the face of such a change is simply to insist that the innovation not be adopted and the work continued to be done in the traditional way. . . . But the protection Congress afforded to work preservation agreements cannot be limited

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[63] The abandonment concept, as a matter of substance, seems inconsistent with the rigid standard firmly embedded in Board policy which is deferred to in interpreting the degree to which a labor organization has relinquished benefits for the term of a collective bargaining agreement. Thus, with respect to this area the Board has for many years, applied the following evidentiary test:

> A waiver is not to be readily inferred and it should be established by proof that the subject matter was consciously explored and that a party has "clearly and unmistakably waived its interest in the matter" and has "consciously yielded" its rights. See e.g., *Century Electric Motor Co.*, 180 NLRB 1051, 1055 (1970).

It seems inconceivable that a more relaxed evidentiary rule would obtain in assessing what issues are a proper subject of bargaining in contract renewal talks. Yet, on the facts presented here, to find an abandonment based the accommodations made by ILA in 1959 and 1968, is to accept substantiation on evidence far less compelling than that which would reasonably reflect a "conscious yielding" in that respect.

> solely to employees who respond to change with intransigence. . . . The work preservation doctrine then, must also apply to situations where unions attempt to accommodate change while preserving as much of their traditional patterns as possible. . . . 480 U.S. at p. 505-506.

The various contentions made by the Charging Parties with respect to abandonment all fail to envision collective bargaining as an ongoing process, through which industrial strife is frequently averted by temporal compromise. They rely on a concept which dictates that labor organizations resist any and all change, even though the foundation for employee fear has yet to materialize.[64] The processes of mediation, conciliation, and fact finding, so vital to protection of the public in the case of national emergency or other major labor disputes would lose utility under so narrow a view of collective bargaining. In sum, the above-quoted expressions of the Courts recognize the proper role of collective bargaining with respect to a technology whose impact, in terms of prejudice and gain of affected employees, might only be measured over a period of time.[65] In the final analysis, the abandonment concept prefers strife to sensible accommodation and has no place in the statutory scheme. The contentions based thereon are rejected.

G. *The Right of Control*

In *N.L.R.B.* v. *Enterprise Association of Pipefitters*, 429 U.S. 507 (1977), the Supreme Court confirmed the

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[64] Note that the first containerized vessel did not appear until 1957, and it was not until 1968 that containerization spread beyond the Puerto Rican trade route. See generally Section III, D of this decision, *supra*.

[65] Section III, D of this Decision, *supra*. Between 1968 and 1975 the average daily work force in the Port of New York declined from a 27,000 to 8,500. During that period, the containerized cargo handled in that Port increased from 37 percent to 70 percent. See generally, Section III, D, of this Decision, *supra*.

principle that a labor organization's otherwise legitimate work demands nonetheless entail a secondary objective if the immediate employer is powerless to control assignment of the work sought. This policy is founded on the view that, in such circumstances, the immediate employer is a neutral, pressured by the union solely to force other employers, the true offenders, to relinquish work they assigned to their own employees.[66]

Pursuant to findings heretofore made, the ILA has, in effect, been held to have acted within the ambit of primary work preservation insofar as the Rules on Containers apply within the 50-mile area to (1) LCL container work performed by consolidators and NVOCCs, (2) stripping and stuffing of FSL containers by warehousemen where not performed as an incident to specialized storage-distribution services traditionally performed in that industry, and (3) FSL containers processed by motor carriers pursuant to instruction of or for the immediate convenience of shippers, consignees or their agents. However, consistent with the directive of the Supreme Court in *International Longshoremen Association* v. *N.L.R.B.*, *supra*, further findings are necessary, as indicated below:

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[66] The right of control test is an invaluable tool in resolving otherwise irreconcilable claims on behalf of competing labor organizations in the face of technological change. As here, such advances may entail a redistribution of work to separately represented groups in different sectors of a particular industry. Each group might possess and on a traditional basis exercise skills indistinct from those required to implement the new technology. It is conceivable that each class of workers could utilize the bargaining process to perfect a claim for all such work simply because they have in the past and continue to perform functionally identical work. As control will rest with only one employer or class of employers, the right of control test enables disposition of such competing claims by branding with legitimacy only those negotiated agreements or boycotts which are ". . . addressed to the labor relations of the contracting employer *vis a vis* his own employees." 429 U.S. at p. 528.

> If the Board finds, on remand, that the rules have a lawful work preservation objective, it will then, of course, be obliged to consider the Charging Party's contention that CONASA members did not have the right to control the stuffing and stripping of containers.[67]

Those antagonistic to the Rules argue that the steamship companies and others who are bound thereby lack capacity to assign the work preserved to deepsea ILA longshoremen. Hence, implementing the Rules, is nothing more than the imposition of pressure on signatory employees to reach the true offenders who perform the disputed work with their own employees away from the waterfront. More specifically, it is contended that the shipper, importer or their agents, not the steamship companies, hold control, because it is they who specify the manner in which the containerized cargo is transported both on its sea-ward and surface journey, as well as who strips and stuffs containers. This argument rests on a premise which ignores two critical truths. The first relates to timing and the fact that the choice exercised by shippers, importers and their agents matures only after the technology is made available to them. The second relates to the origin of the technology, and the fact that options made available to shippers, consignees and their agents are not of their own design, but have been made possible by the innovative action of the various employers bound to the Rules. Thus, the oversea container is the main spring of a technology finding its origin within the primary work units. Steamship companies and marine terminal operators have invested their capital and developed the technology which made containers available to the public and which increased their utility through specialized container vessels, container cranes, and other facilities contributing to a dramatically increased productivity on the docks. The wisdom

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[67] 447 U.S. at pp. 511-512.

and resources of contracting employers, exclusively, have made this technology available, and shippers, importers, and their agents are simply the beneficiaries, having played no part in the proliferation of this innovative trend. At the same time, the extension of this technology by contracting employers in the form of services offered to shippers, importers and their agents has prejudiced job opportunities of longshoremen. The ILA has responded by negotiating restrictions on release of work required by this technology from pier side to inland labor. Unlike *Enterprise Association, supra,* this was a response to restrain otherwise discretionary action of the immediate contracting employers, who through their development of and control over the job eroding technology, are the primary offenders of the job interests of their own employees. The ILA's effort to preserve their work through negotiated restrictions with respect to whom and under what conditions the container technology is to be released to outsiders relates directly to a labor relations problem within the primary work unit. Furthermore, as the job guarantees embodied in said Rules take effect as a precondition to release of containers said obligations are imposed upon signatory employers at a time when the latter possess power to comply. In other words, the contractual assignment to ILA operates as a prior restraint upon shippers, importers or their agents who would choose to utilize containers owned or leased by steamship companies in violation of the latter's obligation to deepsea ILA labor. In sum, the element of "shipper's choice" does not preclude a finding herein that ". . . the union was seeking only to regulate the relations between the . . . contractor [signatory employers] and his own employees and to protect a legitimate economic interest of the employees by preserving their unit work." [68]

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[68] 429 U.S. at p. 519.

Notwithstanding, the physical control retained by signatory employers, the proponents of the complaints contend that the national transportation policy administered by the Federal Maritime Commission (FMC) neutralizes that factor by precluding legitimate exercise of such control by the ocean carriers.[69]

Thus, the Shipping Act of 1916, through Sections 16 and 17 thereof, renders it unlawful for any "common carrier by water" to "unfairly treat or unjustly discriminate against any shipper in the manner of . . . cargo space accommodation or other facilities . . .",[70] or "to make or give undue or unreasonable preference or advantage to any particular person . . . or to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . ." [71] Finally, the Shipping Act provides that "every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to, or connected with the receiving, handling, storing, or delivery of property." [72]

These provisions have been construed as precluding ocean carriers from denying services available under their published tariffs to any shipper willing to pay the prescribed charge.[73] Consistent therewith, the FMC has held that enforcement of the Rules on Containers by

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[69] This issue requires consideration of research materials to which many labor practioners might not have ready access. Therefore, such material has been reproduced in this decision to a greater extent than otherwise would be necessary.

[70] 46 U.S.C.S. Section 812 4th.

[71] 46 U.S.C. Section 815 (1st).

[72] 46 U.S.C.S. Section 816.

[73] See *Grace Line, Inc.* v. *Federal Maritime Board*, 280 F.2d 790, 792-793 (C.A. 2, 1960) cert. den. 364 U.S. 933; *Swayne & Hoyt, LTD.* v. *U.S.*, 300 U.S. 297, 303 (1937).

steamship carriers against shippers or consignees is violative of the Shipping Act of 1916. Thus, in *Sea-land Service, Inc., and Gulf Puerto Rico Lines, Inc.*,[74] a steamship company (PRMSA) incorporated the Rules on Containers in a tariff filed with the FMC. Administrative Law Judge Charles E. Morgan of the FMC treated the issue as follows:[75]

> . . . The 1916 Act provides in part that no common carrier by water shall make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of cargo accommodations or other facilities.
>
> PRMSA will not supply PRMSA containers to certain consolidators and deconsolidators, whereas PRMSA will supply its containers to other shippers and consignees in the same geographic area. PRMSA's rules on containers unfairly treat and unjustly discriminate against certain consolidators and deconsolidators inasmuch as PRMSA does not provide them the same facilities as PRMSA provides other shippers and consignees. . . .
>
> PRMSA's rules on containers are in violation . . . insofar as these rules permit certain containerloads to move freely over facilities of PRMSA, that is, over the piers, while PRMSA's rules also require other similar containerloads to be stripped and restuffed at the piers by ILA deepsea labor. The unlawful discrimination results from the unequal availability of the piers for movement of containerloads to and from ships.
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> Clearly, PRMSA's tariff rules on containers unfairly treat and unjustly discriminate against certain ship-

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[74] FMC No. 73-17, 18 S.R.R. 533 (June 14, 1978).

[75] 16 S.R.R. 315, 338-339.

pers and consignees in the matter of cargo space accommodations and other facilities, including the use of the piers and the use of containers for consolidated shipments.

. . . The 1916 Act provides in part that it is unlawful for any common carrier by water to make or give any undue or unreasonable preference or advantage to any person, or to subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect.

PRMSA's rules on containers are in violation . . . in that they unduly prefer certain shippers and consignees, such as for example, those who have certain facilities and whose employees stuff and strip containers, while these rules subject other shippers and consignees to undue and unreasonable prejudice and disadvantage, such as for example, those shippers and consignees who do not have their own facilities or do not have their own employees to stuff and strip containers. PRMSA's rules require certain shippers to suffer transfer or rehandling charges at the piers for their containers to their undue prejudice, while other shippers escape such transfer charges to their undue preference. . . .

. . . The . . . Act, . . . provide[s] that the common carriers by water in the Puerto Rican trade must provide just and reasonable rates, regulations and practices relating to various matters, including the receiving, handling, transporting, storing or delivering of property; and that if the FMC finds these rates, regulations and practices to be unreasonable, it may prescribe just and reasonable rates, regulations and practices.

PRMSA's rules permit shippers to be held liable for fines or penalties of $1,000 per container, which penalties have no relationship to the cost of trans-

portation or of handling of the container from an ocean transportation viewpoint. These PRMSA tariff rules in part are ambiguous and uncertain in that they are not clear on their face, and are subject to various interpretations. PRMSA's rules are unreasonable insofar as certain shippers must undergo the added transfer charges, for example, of $172 per 40-foot container, in order to avail themselves of PRMSA's FAK rate on containerloads, when there is no transportation necessity to transfer the contents of a container from one container to another container. PRMSA's rules are unreasonable in a number of other ways, including that they deny containers to some shippers while providing containers to other shippers, and that the rules require certain consignees to warehouse their imports under certain restrictions while not so requiring other consignees to so warehouse their imports. For the reasons stated in this paragraph PRMSA's tariff rules on containers are unjust and unreasonable in violation . . . of the . . . Act. . . .

In *Volkswagenwerk* v. *FMC*, 390 U.S. 261 [8 SRR 20, 109] (1968), the Supreme Court found that a certain agreement among members of the Pacific Maritime Association to impose certain assessments upon member ocean common carriers, stevedores, and terminal operators and their customers was subject to the jurisdiction of the FMC under Section 15 of the 1916 Act. Therein it was stated, at page 278, that we are not concerned here with the agreement creating the Association or with the collective bargaining agreement between the Association and the ILWU (International Longshoremen's and Warehousemen's Union).

CONASA in its opening brief states that in this *Volkswagenwerk* case the Supreme Court reaffirmed that there is a labor exemption from antitrust stat-

utes for labor agreements which would otherwise be subject to such antitrust regulation. What the Supreme Court actually said was that those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board, but the Supreme Court went on to say that the assessment arrangement in issue affected only relationships among Association members and their customers. Thus, there was no labor agreement in issue in the *Volkswagenwerk* case.

More importantly, nowhere in *Volkswagenwerk* v. *FMC*, *supra*, is there any issue of the lawfulness of a tariff rule. Whatever significance that case has to the present investigation possibly may be found in the concurring statement of Justice Harlan. He was concerned about the exact extent of the labor exemption from statutes regulating competition. He pointed out that no collective bargaining agreement was before the Court and that it would be inappropriate to suggest the affirmative extent of the labor exemption or immunity. He went on to say, at page 287, that:

> "the assessment agreement before us is not immune or exempt, for it raises 'shipping' problems logically distinct from the industry's labor problems; at the same time the Commissions review itself must be circumscribed by the existence of labor problems that it is not equipped to resolve."

In the present proceeding, PRMSA's tariff rules on containers raise shipping problems logically distinct from the labor problems which may be raised by the ILA's Rules on Containers. Anytime two shippers seeking the same ocean transportation service are treated differently by an ocean carrier, to the extent

> that one shipper is unduly and unreasonably preferred and the other shipper is unduly and unreasonably prejudiced, there is a shipping problem. The FMC must exercise its jurisdiction over shipping problems.

The decision of the Administrative Law Judge issued on October 9, 1975, but was not adopted by the FMC until June 14, 1978.[76] In affirming the reasoning of the Administrative Law Judge, the FMC stated as follows:[77]

> We are of the opinion that the rules published in PRMSA's tariff were properly found by the Presiding Officer to create an anomalous condition where shippers who are similarly situated in all other transportation respects, are treated decidely differently. Further, we agree with the Presiding Officer that the existence or not of a collective bargaining agreement which *affects* but is not *a part of* the transportation aspects of a shipper's relationship with his carrier, need not be given overwhelming priority or weight as a transportation factor by which to justify dissimilarity of treatment. We may agree that such an agreement is a factor to be considered. However, there are other such factors. The mere existence of the collective bargaining agreement does not preempt those other factors or foreclose our consideration of them. For us to adopt the contentions of respondents would be tantamount to an acknowledgment by us that a common carrier by water or other person subject to our jurisdiction could escape our jurisdiction by the simple device of voluntarily (albeit with pressure from a union) entering into an agreement which obligates the common carrier to take actions which may be or are in clear violation of the Shipping Act. We do not view the impact of the National

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[76] 18 S.R.R. 553, FMC Nos. 73-17, 74-40.

[77] 18 S.R.R. 557.

> Labor Relations Act as permitting a common carrier to disregard entirely its statutory obligations when conducting and resolving labor-management negotiations. We find that upon consideration of the *transportation factors* in the situation created by these rules, including the underlying ILA-CONASA agreement, the disparity of treatment under the rules is not adequately justified.
>
> This is not an adoption of a "per se violation" concept. It is rather, a simple acknowledgment by us that the record in this proceeding shows adoption and implementation of tariff rules which are unjust and unreasonable, and which are unduly and unreasonably prejudicial and disadvantageous because their effects are *unjustified by transportation factors.*

An appeal to the above determination was filed in the Circuit Court of Appeals for the District of Columbia, on August 9, 1978, which to date is still pending.[78]

If the findings heretofore made are tenable, the above ruling by the FMC presents a fundamental conflict between the national labor and transportation policies.

Respondents contend, however, that the FMC ruling should not be given effect, since rendered obsolete by Congress' supervening enactment of the Maritime Labor Agreement Act (MLAA) on August 8, 1980. It is observed that by virtue thereof the *Sea-land* ruling has been superceded by a new proceeding before the FMC which will address the questions previously litigated before that Agency as well as the newly enacted statutory exemption.[79]

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[78] 20 FMC 788, 20 S.R.R. 553 (1978) appeal pending *sub nom. CONASA and NYSA v. FMC and USA*, C.A.D.C. No. 78-1776.

[79] *The "50-mile Container Rules," Implementation by Common Carriers by Water Serving the Atlantic and Gulf Coast Ports of the United States-Possible Violations of the Shipping Act, 1916, and the Inter-coastal Shipping Act, 1933*; Order of Investigation February 3, 1981, Docket No. 81-11.

First, with respect to the new proceeding before the FMC, it appears that the focus of this investigation relates exclusively to the reimplementation of the Rules on January 1, 1981, by steamship companies, and by practices engaged in pursuant thereto which might be violative of the Shipping Act. It does not clearly appear that said proceeding is intended as a vehicle for FMC reconsideration of *Sea-land Service, Inc.* and *Gulf Puerto Rico Lines, Inc., supra.* On the contrary, the FMC's 1981 Order of Investigation might be interpreted as predicated on that very authority. Thus, as stated at page 3 of said Order:

> "The activities described herein appear to be essentially service restrictions and/or the imposition of additional charges which must be reflected in the carrier's tariffs. Moreover, the Commission has in the past found similar practices to be a proper subject matter for ocean carriers' tariffs. *Sea-land Service, Inc.* and *Gulf Puerto Rico Lines, Inc.—Proposed Rules on Containers* and *Puerto Rico Maritime Shipping Authority—Proposed ILA Rules on Containers*, 20 FMC 788, 20 SRR 553 (1978), appeal pending *sub. nom. CONASA* and *NYSA* v. *FMC and USA*, D.C. Cir. No. 78-1776. Thus, if the carriers named as Respondents have engaged in any of the practices described herein, then the failure of the carrier to effect those paragraphs in their tariffs would appear to violate the following requirements of Section 18 (b) of the Shipping Act, 1916, and/or Section of the Intercoastal Shipping Act, 1933. An investigation is therefore necessary to determine whether the carriers have in fact engaged in these practices."

Furthermore, it also does not clearly appear as the Respondents suggest, that the MLAA ". . . exempts labor accords like the Rules on Containers, from unsettling regulation under federal shipping laws." On the contrary, the provisions and legislative history of the MLAA

strongly suggest that the FMC retained jurisdiction over claims arising under the anti-discrimination provisions of the Shipping Act, even though the practices complained of might derive from or be dictated by a collective bargaining agreement.

Thus, said amendment to the Shipping Act arose against a background in which the FMC had historically spurned jurisdiction over review of labor agreements. Consistent with this stance, the FMC considered further legislation necessary in light of judicial decisions which indirectly, under Section 15 of the Shipping Act [80] required prior approval by FMC of maritime collective bargaining agreements.[81] The problem was outlined by one commentator during the Senate Committee hearing, as follows:

> As a consequence of Supreme Court decisions, collective bargaining agreements and related agree-

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[80] Section 15 of the Shipping Act, provides, in material part that persons subject thereto file with the FMC "every agreement":

> "fixing or regulating transportation or fares; giving or receiving special rates, accommodations, or other privileges or advantages; controlling, regulating, preventing or destroying competition, . . . limiting in any way the volume or character of freight . . . to be carried; or in any manner providing for an exclusive, preferential, cooperative working arrangement.
>
> * * * *
>
> Any arrangement an any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellation shall be lawful only when and as long as approved by the Commission; . . . ." 46 U.S.C. Section 814.

[81] Previously, in 1968, the Supreme Court in *Volkswagenwerk* v. *F.M.C.*, 390 U.S. 261, mod. 393 U.S. 901 (1968), held, contrary to the FMC, that Section 15 applied to an agreement between members of a multiemployer association as to the financing of an employee benefit program established in a collective bargaining agreement. In *F.M.C.* v. *Pacific Maritime Association*, 435 U.S. 40 (1977), the Supreme Court extended this view, deeming Section 15 applicable to specific terms of a collective bargaining agreement.

ments among multi-employer bargaining associations which implement collective bargaining agreements are now considered agreements which must be filed with the FMC for approval. The FMC may also impose penalties and award reparations against individual members of these multi-employer associations for practices arising out of or based upon collective bargaining agreements if the FMC finds the practice in question to be in violation of any provisions of the 1916 act.

Presently, the FMC does not require section 15 filings for collective bargaining agreements and relies upon its general exemption authority in the Shipping Act as the basis for doing so. The agency has said, however, that specific statutory authority to exempt collective bargaining agreements is preferable.[82]

Initially, the House version of the MLAA afforded relief not only from filing and prior approval requirements, but extended total exemption to discriminatory practices derived from collective bargaining agreements through specific exemption to Sections 16 and 17 of the Shipping Act. The expressed purpose of the Bill adopted by the House was ". . . to prohibit regulation of collective bargaining agreements by the Federal Maritime Commission . . . ." H.R. Rep. No. 876, 9th Cong., 2d Sess. 1 (1980). The text thereof, drafted as an amendment to Section 15 of the Shipping Act, plainly accomplished this sweeping objective:

> . . . collective bargaining agreements and all provisions thereof, between a common carrier by water, other persons subject to this chapter of a multiemployer bargaining group and a labor organization representing employees in the maritime or stevedor-

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[82] *Hearing on H.R. 6613 before the Subcom. on Merchant Marine and Tourism of the Senate Comm. on Commerce, Science and Transportation*, 96th Cong., 2d Sess. 1 (June 4, 1980) (opening statement by Sen. Inouye).

> ing industry, and any agreements preparatory thereto among members of the multiemployer bargaining group, and any provisions for the implementation of the collective bargaining agreement, including the means and method of raising the money for wages, fringe and other employee benefits provided in the collective bargaining agreements, shall not be deemed either an agreement or a cooperative working arrangement subject to the filing provision herein: *And provided further, that said collective bargaining agreements and agreements preparatory to, and for the implementation thereof, shall not be subject to Commission jurisdiction for any purpose under any other provision of this chapter including, but not limited to, Sections 16, 17 and 22 thereof.*[83] (Emphasis supplied.)

Respondents' position as to MLAA would have been persuasive had this version cleared the legislative process. However, it did not.

After passage in the House by a vote of 358 to 2, the Senate Commerce Committee, upon extensive testimony from persons representing many facets of the shipping industry, adopted a substitute. Insofar as material herein, the Senate version amended Section 15 to except labor agreements from prior approval by the FMC. But, most importantly, no amendments were included affording collective bargaining agreements relief from Sections 16 and 17 of the Shipping Act. The basis for this difference was made apparent by the Senate Report on the substitute:

> On June 4, 1980, the Merchant Subcommittee of the Senate Committee on Commerce, Science and Transportation held hearings on H.R. 6613, at which 11 witnesses, including the FMC, testified. Several of the witnesses representing shippers and significant sectors of the maritime industry, indicated they had

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[83] H.R. Rep. No. 876, *supra*, p. 11.

> not been aware that the House was considering H.R. 6613, and consequently had not been able to express their opposition to the legislation at that time.
>
> The witnesses who appeared at the Committee's June 4 hearing were nearly unanimous in support of exempting collective bargaining agreements from the filing and prior FMC approval requirements of Section 15 of the Shipping Act. The majority of those opposing H.R. 6613 as it passed the House, however, felt the bill went beyond what was necessary to assure free and unfettered collective bargaining, and that it stripped the FMC of jurisdiction to assure equal treatment of shippers, cargo, and localities, and to prevent abuses made possible by . . . concerted activity of carriers and others. The Federal Maritime Commission was among the witnesses who testified that the bill went beyond what was necessary. The agency also said it was technically deficient. S. Rep. No. 854, 96th Cong., 2d Sess. 10 (1980)

As was noted, a number of witnesses who testified before the Senate Committee had had no opportunity to testify before House passage of the Bill.[84] However, these witnesses voiced strong opposition to the bill on the grounds that the proposed legislation removed too much from FMC jurisdiction. The following statement of the FMC is in consonance with the views presented by those theretofore unheard:

> The Commission had some misgivings about the wisdom of exemptions which extend beyond section 15. . . . The provisions of the Act that would no longer apply were designed to ensure equal treatment of shippers, cargo and localities and to prevent abuse

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[84] In fact, only one party opposing the bill had an opportunity to testify before the House. See: Testimony of Gerald Ullman, General Counsel, National Customs Brokers Forwarders Association of America, Inc., *Hearings, supra*, p. 89.

made possible by concerted activity of carriers and others. The question that must be answered before these protections are removed is whether there are other laws which adequately protect these shipping interests absent the Shipping Act. To the extent that other laws protect the interests of shippers, ports and others from unfair treatment, Shipping Act protections could be removed without harm but Congress must ensure such protections exist before pursuing that course.

Whether the antitrust laws would afford sufficient protection to affected parties is a difficult question to answer. Certainly, some protection would be afforded under section 1 of the Sherman Act where the rate, charge or practice was the product of a combination or conspiracy in restraint of trade. However, if an individual carrier chose to implement a provision of a collective bargaining agreement in a discriminatory or unreasonable fashion, it is not at all certain that the antitrust or labor laws would provide a remedy.

There is some possibility that a common law remedy would exist for failure of a common carrier or public terminal operator to live up to its obligations to serve the public equally. However, in order for any common law rights to be resurrected it would take a very strong and clear statement from Congress to overcome the inference that would be generated by partial repeal of the statutory scheme that was enacted to replace those common law rights in the first place. Moreover, resurrection of such common law rights would simply shift the forum from the agency charged with expertise in shipping matters to a variety of judicial forums.[85]

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[85] *Hearing before the Merchant Marine and Tourism Subcom. of the Senate Comm. on Commerce, Science and Transportation, supra,* pp. 17-18.

The Senate Bill, which was adopted subsequently by both Houses of Congress, specifically affirmed the FMC's jurisdiction under Section 15 with respect to assessment agreements "whether part of a collective bargaining agreement or negotiated separately," but simply replaced the requirement of prior approval with a subsequent condemnation procedure. Insofar as material, the addition to Section 15 provides as follows:

> Assessment agreements, whether part of a collective bargaining agreement or negotiated separately, to the extent they provide for the funding of collectively bargaining fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized, shall be deemed approved upon filing with the Commission. The Commission shall thereafter, . . . disapprove, cancel, or modify any such agreement, or charge or assessment pursuant thereto, that it finds, after notice and hearing, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, or to operate to the detriment of the commerce of the United States. . . . To the extent that any assessment or charge is found, in such . . . proceeding, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, the Commission shall remedy the unjust discrimination or unfairness. . . .

With respect to tariffs, the Senate bill failed expressly to exempt labor agreements from Sections 16 and 17 of the Shipping Act. But consistent with the testimony offered to the Senate Commerce Committee and the intention manifested in the Senate Report, the preservation of FMC jurisdiction with respect to unjust discrimination in that area seems evident in the proviso included in a new Section 45 added by the Senate, which recited as follows:

> The provisions of this Act and of the Intercoastal Shipping Act, 1933, shall not apply to maritime labor

agreements and all provisions of such agreements except to the extent that such provisions provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized. Notwithstanding the preceding sentence, nothing in this section shall be construed as providing an exemption from the provisions of this Act or of the Intercoastal Shipping Act, 1933, for any rates, charges, regulations, or practices of a common carrier by water or other person subject to this Act which are *required to be set forth in a tariff*, whether or not such rates, charges, regulations, or practices arise out of, or are otherwise related to a maritime labor agreement. [Emphasis supplied.]

Contrary to the Respondents, the immediate conflict between the labor and transport policies was in no sense lessened by the MLAA. Nonetheless, I agree with Respondents that to honor the FMC Rulings would be mischievous in the present posture of the case. To view the matter otherwise is to invoke an NLRB remedy with respect to conduct legitimate under the policy of that Agency, and to justify that result solely by reference to the interpretations of another administrative agency charged with implementing a distinct Congressional concern.

It is true that the National Labor Relations Board has been deemed obligated to give effect to express Congressional mandate. Thus, in *Southern Steamship Co.* v. *Labor Board*, 316 U.S. 314 (1942), the Supreme Court held that the Board erred in ordering reinstatement of seamen discharged for their participation in a mutinous strike which on its face violated Section 292 and 293 of the Federal Criminal Code. The Court in deleting the Board's remedy stated that it ". . . ignores the plain Congressional mandate that rebellion by seamen against

their officers on board a vessel anywhere within the admiralty and maritime jurisdiction of the United States is to be punished as mutiny." [86] The Court also stated, however, that:

> ". . . Nothing that we have said would prevent the Union from striking, picketing or resorting to any other means of self-help so long as the time and place it chooses do not come within the *express* prohibition Congress." [87]

Adherence, however, to express statutory constraints on employee conduct is not the equivalent of giving finality to interpretative efforts of other administrative agencies in effectuating different Congressional policy pursuant to different legislative standards. This was made clear in *Local 1976, Carpenters (Sand Door)* v. *N.L.R.B.*, 357 U.S. 93, wherein the Supreme Court, *inter alia*, rejected the Board's view that otherwise lawful hot cargo provisions are to be deemed invalid where executed by common carriers subject to the Interstate Commerce Act. In this respect, the Court reasoned as follows:

> In the recent *Genuine Parts* case, already referred to, *Truck Drivers Union*, 119 N.L.R.B. 399, two members of the Board in fact took this position, stating that when common carriers are involved hot cargo clauses are "invalid at their inception and can be given no operative cognizance so far as the administration of this [the Labor Management Relations] Act is concerned." This is true, it is said, because by entering a contract not to handle the goods the carrier violates its obligations under the Interstate Commerce Act to provide nondiscriminatory service and to observe just and reasonable practices. . . . The Interstate Commerce Commission has in fact ruled that . . . car-

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[86] 316 U.S. at p. 43.

[87] 316 U.S. at p. 49.

riers . . . were not relieved from their obligations under the Interstate Commerce Act by a hot cargo clause.

It is significant to note the limitations that the Commission was careful to draw about its decision. . . . It was not concerned to determine, as an abstract matter, the legality of hot cargo clauses, but only to enforce whatever duty was imposed on the carriers by the Interstate Commerce Act and their certificates. The Commission recognized that it had no general authority to police such contracts, and its sole concern was to determine whether a hot cargo provision could be a defense to a charge that the carriers had violated some specific statutory duty. It is the Commission that in the first instance must determine whether, because of certain compelling considerations, a carrier is relieved of its usual statutory duty, and necessarily it makes this determination in the context of the particular situation presented by the case before it. Other agencies of government, in interpreting and administering the provisions of statutes specifically entrusted to them for enforcement, must be cautious not to complicate the Commission's administration of its own act by assuming as a fixed and universal rule what the Commission itself may prefer to develop in a more cautious and pragmatic manner through case-by-case adjudication.

* * *

The case is not like that in *Southern S.S. Co.* v. *N.L.R.B.*, 316 U.S. 31, where the Board was admonished not to apply the policies of its statute so single-mindedly as to ignore other equally important Congressional objectives. A specific remedy ordered by the Board-reinstatement of employees who had engaged in a strike-worked directly to weaken the effectiveness of a statutory prohibition against mutiny by members of the crew of a vessel. Presumed ille-

> gality under the mutiny statute was not used to establish a violation of the labor statutes. It was relied on to establish an abuse of discretion in giving a remedy. Much less was there any suggestion that the Board should abandon an independent inquiry into the requirements of its own statute and mechanically accept standards elaborated by another agency under a different statute for wholly different purposes.

Sand Door, though by no means indistinguishable is more closely analogous to the immediate issue than *Southern Steamship*. But, in any event, other practical considerations warrant a disregard of the FMC rulings herein. Firstly, neither orders of the Board nor those of the FMC are self-enforcing and hence differences as to which policy will prevail will ultimately require judicial endorsement. It would seem, therefore, that the administrative-judicial process is most effectively served by each agency acting on its own in the area of its special expertise.[88]

Furthermore, clear guidelines have not been called to attention of this writer suggesting when and under what circumstances one agency should defer to the determinations of the other. Hence an extension of comity to FMC in this instance would rest on little more than that Agency's having acted first. Such a fortuity seems a dubious predicate ". . . for careful accommodation of one statutory scheme to another . . ." [89] and for Board abdication of ". . . its immediate task" and other important rights conferred by the legislature. Thus, the exemption afforded by Congress to primary activity under the boy-

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[88] The FMC's ruling on the container issue has yet to receive Court approval. Should said ruling be rejected after the Board were to give it binding effect, the instant proceeding would have to be reopened for consideration in that light.

[89] *Southern S.S. Co.* v. *N.L.R.B.*, *supra*, 316 U.S. at p. 47.

cott provisions of the Act is no less than an amplification of the rights guaranteed employees through Section 7 ". . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Unquestionably, the FMC, as perhaps was its duty, nullified those rights without airing [erring] in holding that the Rules on Containers are discriminatory and unenforceable simply because they impose conditions, not founded on transportation factors, which result in a difference in treatment between complying and noncomplying shippers and importers.

It may well be that in the final analysis, the adverse impact on shipping interests brought about by the Rules on Containers will be afforded primacy and deemed a controlling element of analysis of 8(e) and 8(b)(4)(A) and (B) issues. However, there being no cognizable authoriity as to which policy serves the public interest in more compelling fashion, reconciliation of the conflict would seem beyond the province of the administrative agancies. Hence at this point foundation is lacking for preferring the policy aimed at protecting competition in the maritime sector over that designed to mitigate labor-management strife in that and other industries. Accordingly, the FMC ruling is regarded as having no cogent influence upon the assessment of the Union's objective under the secondary boycott provisions of the National Labor Relations Act.

For the above reasons, the contentions of the General Counsel and Charging Parties in this respect are rejected, and it is concluded that to the extent supported by a legitimate work preservation objective, as heretofore found, the Rules are not faulted on the basis of the "Right of Control Doctrine." Instead, it is concluded that the employers signatory to the Rules, by virtue of their control over access to the container technology and the dispersal of jobs inherent therein, possessed the capacity themselves to resolve the underlying dispute.

H. *The Individual Cases*

1. *American Trucking Association* 22-CE-44, et al.

On December 6, 1980, an agreement was entered between the ILA, its affiliates and NYSA, CONASA, STA, The West Gulf Maritime Association, The Southeast Florida Employers Association, and the Mobile Steamship Association, Inc., whereby the Rules on Containers were again to be subject to enforcement, effective January 1, 1981.[90] In consequence, unfair labor practice charges were filed on December 19, 1980 and on February 18, 1981, the General Counsel issued a first amended consolidated complaint thereon, alleging that said re-entry of the Rules violated 8(e), and that, in connection therewith ILA, on or about December 6, 1980, threatened to induce and encourage individuals employed by NYSA, CONASA, STA, and HRSA to strike, and at that time coerced and restrained certain of said associations to force their entry in said agreement, thereby violating Section 8(b)(4)(i)(ii)(A) of the Act. Said complaint further alleged that the ILA, in furtherance of a primary labor dispute with American Trucking Associations, Inc. (ATA), Twin E press, Inc., (Twin) and the International Association of Non-Vessel Operating Common Carriers (IANVOCC), on or about December 6, 1980, threatened to induce and encourage individuals employed by certain of said steamship associations to engage in a strike and coerced and restrained certain of said steamship associations to force them to cease doing business with ATA, Twin, and the IANVOCC in violation of 8(b)(4)(i)(ii)(B) of the Act.

The specific terms of the complaint relate solely to the circumstances surrounding the agreement entered on or about December 6, 1980. There are no allegations placing in issue any aspect of the enforcement of the Rules as

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[90] See Appendix (vii) attached hereto.

contemplated by Respondents during the period following January 1, 1981. As the complaint fails to advert to improper application or pressures invoked by ILA after December 6, 1980, litigation of that question is beyond the purview thereof and not cognizable in this proceeding.[91]

On the issues framed by the pleadings, there is no evidence that ILA threatened the steamship associations in support of its demand for reimplementation of the Rules nor is there any suggestion that employees were induced to engage in any stoppage in connection with either those negotiations or demands for reapplication of the Rules.

Notwithstanding this failure of proof, it is argued that violations of 8(b)(4)(i)(ii)(A) and (B) are nonetheless maintainable by virtue of the inclusion of penalties in the Rules, in the form of liquidated damages. Unquestionably, liquidated damages are the equivalent of a fine and represent a continuing coercive restraint upon signatory employers to re-enter the Rules through enforcement as against noncomplying third parties. The Board has held that the incorporation of similar forms of economic pressure as a contractual mechanism for enforcement of an unlawful hot cargo agreement will support 8(b)(4)(i)(ii)(A) and (B) violations.[92] Obviously, however, there is no vice in such self help arrangements where designed to enforce negotiated arrangements lawfully preserving work within the primary work unit, for in such a context

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[91] Thus, affidavits included in Joint Exhibit's No. 1 to the extent that they relate to enforcement of the Rules after January 1, 1981, are of no aid to the inquiry. Though left uncontradicted by Respondents, conduct within this time frame, as indicated, in those affidavits was beyond the allegations in the complaint. Respondents were not placed on notice that said conduct was a matter in issue, and consistent with due process those matters could not be said to have been the subject of full litigation herein.

[92] See e.g., *Ets-Hokin Corporation, Etc.*, 154 NLRB 839, 841-843.

the objectives proscribed variously in 8(b)(4)(A) and (B) are lacking and no violation inures. No more can be found on the instant record. The Rules on Containers are not unlawful on their face, but are ". . . a facially valid agreement [which] may be invalid for Section 8(e) purposes in particular factual contexts. . . . In its other applications, the same agreement . . . retain[s] its validity." [93] The conclusions herein that the Rules violate 8(e) are predicated upon their specific application to motor carriers and warehousemen, but only insofar as containers are processed by the latter in conjunction with their own traditional work patterns neither created by containerization nor in competition with that performed by deep-sea ILA labor in connection with services historically provided by the latter's maritime employers. In all other respects, the Rules have been deemed lawful. Accordingly, as the complaint in *American Trucking Associations* neither alleges nor otherwise places in issue any form of proscribed application, no foundation is laid for concluding that the 1980 re-entry violated Section 8(e), or that any pressures applied to signatory employers in quest thereof were for objects condemned by Section 8(b)(4)(A) or 8(b)(4)(B). Accordingly, it shall be recommended that said complaint be dismissed in its entirety.

2. *Consolidated Express, Inc.*, 221 NLRB 956 (1975), enf'd 537 F.2d 706 (C.A. 2, 1976), cert. den. 429 U.S. 104 (1977); *Puerto Rican Marine Management, Inc.*, 245 NLRB No. 171 (1979); *Dolphin Forwarding, Inc.*, 236 NLRB 525 (1978), enf'd den. 613 F.2d 890 (C.A.D.C. 1979).

Dismissal of the above cases shall be recommended. All involved NVOCCs or consolidators, against whom, the Rules were enforced by either the withholding of containers, or by refusal to load containers aboard ship because stuffed offshore within the Port area in

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[93] *Carrier Air Conditioning Co.* v. *N.L.R.B.*, *supra*, 547 F.2d at p. 1185.

contravention thereof. Having found herein that the Rules apply legitimately to such practices, they were subject to lawful enforcement to preserve the traditional work of deepsea ILA labor, and, accordingly, it shall be recommended that the complaints alleging 8(e) and 8(b)(4)(ii)(B) violations in each of the cited cases be dismissed in their entirety.

3. *Associated Transport, Inc.*, 231 NLRB 351 (1977), enf'd den. 613 F.2d 890 (C.A.D.C., 1979) remanded 447 U.S. 490 (1980).

The 8(e) and 8(b)(4)(ii)(B) allegation in this case related to enforcement of the Rules against the practice of "shortstopping" FSL containers within the 50 mile port area by motor carriers. Each application of the Rules pertained to container stripping, pursuant to immediate reloading of cargo into over-the-road trailers, consistent with historic motor carrier practice, which was not created by marine technology, nor in competition with Maritime employers. Thus, the offshore work in no way related to work historically performed by deepsea ILA labor at the piers. As heretofore indicated, the application of the 50-mile rule in such a context is not supported by a legitimate work preservation objective and is secondary and violates 8(e). The fines imposed on the steamship company to enforce the Rules in this respect violated 8(b)(4)(ii)(B). Accordingly, it shall be recommended that the order theretofore issued by the Board in this case be reaffirmed, with the modifications recommended herein.

4. *Hill Creek Farms, Inc.*, Case No. 4-CC-1133, 4-CE-55.

As indicated, this case was pending on exceptions to the Judge's Decision at the time of its consolidation herewith. In that case, the Administrative Law Judge found that locals of the ILA had violated Section 8(b)(4)(i)

(ii)(B), and that the 30-day warehouse rule violated 8(e).

The case involved aplication of the 30-day warehouse clause to a cold storage warehouse, Hill Creek, within the Port of Philadelphia. Briefly stated the facts in that case showed that ILA affiliates received information that Hill Creek was not complying with the 30-day storage requirement, but stripped refrigerated containers of imported meat for immediate loading on trucks. Based thereon, an ILA affiliate interceded to preclude release of such containers to Hill Creek. In finding that the 30-day warehousing clause was violative of Section 8(e) and that the union's conduct violated 8(b)(4)(i)(ii)(B), the Administrative Law Judge relied principally upon the *Conex* rationale and the Board's position therein that the Rules seek to acquire offshore work, rather than to preserve work traditionally performed by the ILA at the pier.

As heretofore indicated at pages 48-52, *supra*, the 30-day warehouse clause, depending on the circumstances, may or may not be supported by a lawful work preservation objective. Thus, it would be lawful as applied to traditional distribution services not created by containerization which did not result in displacement of ILA labor since not in competition with services available through steamship companies or marine terminal operators. On the other hand, as discussed at pages 51-52, *supra*, the *Hill Creek* case presents a fact pattern to which the 30-day rule would legitimately apply as a means of protecting ILA labor against a new pattern of competition made possible through containerization, which threatened their traditional work practices, by placing pier side cold storage warehouses, which are within the primary unit, at a competitive disadvantage, and thereby eroding work opportunities of deepsea ILA labor. Accordingly, the 8(e) allegations, challenging this

application of the 30-day warehousing requirements is viewed as unsubstantiated.[94]

Furthermore, as the withholding of the containers by the ILA represented a refusal to handle cargo pursuant to a business relationship previously entered by signatory steamship companies in violation of their duly negotiated obligation[95] under the 30-day rule, the pressures were

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[94] The Administrative Law Judge in finding that the rule embodied a secondary objective, relied on certain extrinsic evidence, including statements imputed to an ILA representative that the action taken against Hill Creek was in the interest of securing work for Portside Refrigeration, a cold storage warehouse within the dock area, which employed ILA labor. In this connection, the Administrative Law Judge concluded that Portside Refrigeration was neither signatory to the Rules nor an employer within the primary work unit. Respondent, in its post-hearing brief, excepted to this latter finding. In an answering brief, dated November 14, 1979, filed with the Board, the General Counsel represented as follows: "Counsel for the General Counsel will stipulate with respect to Respondents' exception 1 and 2, although these facts are not in the record, that Portside Refrigeration is a member of P.M.T.A. and all of Portside's [warehouse] employees are represented by ILA."

[95] The Administrative Law Judge, in finding the violation of Section 8(b)(4)(B), reasoned further that at the time the Hill Creek containers were held on the docks, control had passed to Hill Creek and its motor carrier. From the evidence, however, it does not appear that these containers ever left the dock. In any event, by virtue of the 30-day rule, steamship companies are foreclosed at the outset from releasing containers to warehousemen that fail to abide by the Rules. On evidence that Hill Creek was not complying therewith, ILA members had the right to withhold their labor to enforce the signatory member's obligation which matured at time when the latter possessed the requisite control. The fact that the ocean bill of lading designated the containers as "House-to-House," is viewed as of no consequence. Prior to acceptance of such an arrangement, the steamship companies are in a position to honor their commitment to the ILA by conditioning access to its vessel and containers upon guarantees that the consignee will not remove cargo from the inland warehouse prior to expiration of the 30-day period. Steamship companies having failed to honor their commitments to the ILA in

of a primary nature and not for an objective proscribed by Section 8(b)(4)(i)(ii)(B).

5. *The Terminal Corporation*, 250 NLRB 8 (1980)

This case involved 8(b)(4)(i)(ii)(B) violations arising from container handling operations of the Terminal Corporation, a bona fide warehouse operating within the port limits of Baltimore, and is illustrative of the diverse conclusions to be reached in assessing applications of the 30-day rule. Thus, Terminal's warehouse facilities in the Port of Baltimore were utilized by a German manufacturer of firebrick. The firebrick was stuffed in Germany in FSL containers and consigned to Terminal. On import, Terminal would strip the container and pursuant to instructions from the exporter, would hold a portion as inventory against future orders, while distributing quantities of brick already sold. Sometimes, the brick would remain in the warehouse for less, and sometimes longer, than 30 days. The warehouse, in addition to its utility in inventoring against future orders, also made available bricks of various sizes allowing customers to make last minute determinations as to the size needed to meet their requirements.

The Administrative Law Judge found that with respect to such containers, the ILA violated Section 8(b)(4)(i)(ii)(B), by ILA induced temporary refusal of its members to release such containers to Terminal because accompanying shipping papers lacked the 30-day warehousing language as required.

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this respect, are fair game for primary strike action, just as would be the case with respect to an employer, struck in protest of a loss of unit work, which occurs after said employer has contracted out such work in violation of a contractual ban on subcontracting. In either case, self help to enforce otherwise legitimate obligations of the immediate employer do not lose their character as primary activity solely because said employer has removed the work from the primary unit in violation of said obligations.

For the reasons stated at pages 50-51, *supra*, the 30-day rule as applied in the above context is unlawful since an intrusion upon traditional inland warehousing practices within the area of cargo storage; i.e., indefinite, deferred, partial distribution, pursuant to a continuing relationship with a consignee or exporter, which is neither in competition with those provided by marine terminal warehouses, nor created by container technology, nor a threat to the work of deepsea ILA labor. In short, the applications of the rule to the FSL import containers in this case involved an attempt by ILA, pursuant to the rules, to compensate for their own job losses, by acquisition of the work historically performed by others.

Additional 8(b)(4)(i)(ii)(B) violations were found by the Administrative Law Judge in connection with Terminal's handling of export containers. In this connection it is noted that prior to containerization, *Terminal* performed no services in connection with export cargo in the port of Baltimore. However, in 1979, Terminal entered into an agreement with a shipper of scrap paper that previously had utilized its own employees to stuff FSL export containers. Under the arrangement, the shipper would deliver scrap paper to Terminal, and the latter would simply stuff the containers for export. It does not appear that Terminal, in connection therewith, performed any specialized warehousing services. Accordingly, it appears that with respect to these export containers, Terminal acted solely in the capacity of a container handling station within the port area, and in making this service available, engaged in work made economically feasible only through containerization, which tended to undermine conditions under which identical work is performed at the piers by deepsea ILA labor. The fact that these containers previously were stuffed by the shipper's own employees, rather than by deepsea ILA labor, is of no consequence. For, it is one thing, for a shipper to avail itself of the exemption created when it stuffs containers on its

own behalf utilizing its own employees, but quite another when it utilizes a port area container handling station to perform that work under conditions which erode the wages, job conditions, and work opportunities to deepsea ILA labor. For the reasons set forth at pages 51-53 herein, I find that the evidence fails to establish that ILA violated Section 8(b) (4) (i) (ii) (B) in this regard.

Accordingly, it is recommended that the Board reaffirm the violations found in *The Terminal corporation* with respect to the stripping of import containers, but dismiss the allegations insofar as they relate to the stuffing of export containers.

6. *Beck Arabia, LTD*, 245 NLRB No. 172.

This case involved the stuffing of FSL containers for export by Shipside Packing Company, a general warehouse and packing operation located in the port of Baltimore. The shipper involved was Beck Arabia, Ltd, a national of Saudi Arabia, which is engaged in the construction of hotels, apartment buildings, shopping centers, and housing projects in Saudi Arabia. The latter maintains offices in Dallas, Texas, from which it is engaged in the procurement of goods and materials utilized in connection with such foreign construction endeavors. Pursuant thereto, Beck Arabia purchases such items directly from a variety of American manufacturers and suppliers, who, in turn, ship said materials directly to Shipside.

Shipside operates as a holding area for purchases by Beck Arabia. As it receives the purchased goods from various vendors, they are checked and stored, pending instruction from Beck Arabia as to which material is to be shipped on which particular vessel. At that point, Shipside will pick from a storage and then consolidate the goods designated for export preparation. Thereafter,

the loaded containers are delivered to the piers by independent motor carriers under contract with Shipside.[96]

For the reasons set forth at footnote 58, *supra*, herein, it shall be recommended that the 8(b)(4)(i)(ii)(B) violation in this case be reaffirmed. The instruction by an ILA affiliate, and refusal, by ILA members pursuant thereto, to handle the export containers of Beck Arabia involved an intrusion on traditional services available through inland warehouses, not available at pier side, not created by containerization, and not historically a part of the ILA's work tradition. The stuffing of the containers in question was but an incident of general storage, picking, and consolidation, pursuant to an ongoing relationship between warehouse and single shipper, which together represent an integrated inland service, distinct from the temporary storage provided at marine terminal warehouses. Accordingly, the Rules on Containers and work preservation attributes thereof, fail to justify the action of the ILA representatives in this case.[97]

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[96] Prior to containerization, at least since 1976, Shipside was primarily engaged in the business of building and constructing specialized wooden boxes for export shipment which it loaded for transport to the piers. At that time, Shipside did not engage in the stuffing or stripping of overseas containers.

[97] The General Counsel further contends in this case that as the containers, in question, were furnished by a steamship company which was not bound by the Rules, the violations originally found are sustainable on this basis as well. Those containers were owned and provided to Shipside by Gulf Lines, Inc., herein called Gulf. CONASA Exhibit 1 is a letter dated November 7, 1980, over signature of C.P. Lambos, as special counsel to Central Gulf Lines, Inc., which recites, in material part, as follows:

> In the port of Baltimore, Central Gulf uses contract stevedores and is subject to and is bound by the collective-bargaining agreements entered into by and between the Steamship Trade Association of Baltimore, Inc., and the International Longshoremen's Association, AFL-CIO.

This conclusory statement by counsel of record, is self-serving hearsay not otherwise substantiated. Other evidence furnished by

7. *Custom Brokers and Forwarders Association of Miami, Inc.* Case No. 12-CE-30

This case was pending on exceptions before the Board at the time of consolidation herewith. Involved in that case was an 8(e) allegation based upon the maintenance and enforcement of the Rules in the port of Miami. The Administrative Law Judge dismissed the complaint, finding that in the port of Miami (1) there was no significant containerization work history prior to 1968, (2) in 1968 the Rules on Containers became effective in that Port, and (3) the Rules have been interpreted and applied since 1968 so that virtually all container work performed since has been performed by ILA labor as required by the Rules. Contrary to *Conex*, he concluded that, in light of the foregoing, the work in dispute could not be defined as "off pier consolidation" but, instead, consisted of the very work defined in the Rules. Accordingly, he viewed the Rules as possessed of a legitimate work preservation objective seeking work which contracting employers held power to assign.

In this particular case, it is observed by the General Counsel and by counsel for the Charging Party that a secondary objective is disclosed herein through the condonation under the Rules of a practice whereby two offshore consolidators, Twin Terminal and Econocaribe were

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the Steamship Association of Baltimore indicates that Gulf is not a direct member of STA. See General Counsel's Exhibit 2(c). One might speculate that Gulf might well be bound to the Rules through the steamship agency which represents Gulf in the Port of Baltimore. However, though evidence of any such arrangement would be available to CONASA, it was not made a part of the record herein. Accordingly, as the record stands, enforcement of any such claim by the longshoremen in this case was not shown to have been invoked with respect to an immediate employer, having power to control assignment of the disputed work, and on that ground as well the 8(b)(4)(i)(ii)(B) violations herein are substantiated.

afforded free access to containers, and allowed to strip and stuff same without ILA interference. It appears that Twin Terminal and Econocaribe maintain facilities off pier from which they consolidate freight.

The collective bargaining agreement covered by the rules in the port of Miami is negotiated between ILA affiliates and the Southeast Florida Employers' Port Association (SFEPA). Neither Twin Terminal nor Econocaribe were members of SFEPA. Evidence does show that either had ever authorized SFEPA to bargain in their behalf. Nonetheless, customarily, upon completion of SFEPA negotiations, both were approached by representatives of ILA affiliates, and during such encounters, and upon request of the latter, they signed such agreements.

Between 1968 and 1979, while offshore consolidators were denied access to containers, under strict enforcement of the Rules, contrary thereto work was diverted, with assent of the Respondents, for offshore consolidation by Twin Terminal and Econocaribe, as an alternative to the performance of this work at the pier by Deepsea ILA labor.

The Administrative Law Judge concluded that these offshore consolidators, were within the primary work unit, and that the rules as applied in the Port of Miami could not be faulted on this ground. In so holding, the Administrative Law Judge noted that neither was a member ". . . of SFEPA and there is no evidence that SFEPA was ever expressly authorized to bargain with ILA . . . on their behalf." Nonetheless, he concluded that because each separately signed the agreements negotiated by SFEPA, participated in the joint trust fund and on the joint grievance committee both "by implication indicated their intention to be bound in collective bargaining by SFEPA rather than bargain on their own behalf." The Administrative Law Judge further concluded that Twin Terminal Services and Econocaribe were part of the

multi-employer bargaining unit represented by SFEPA and failed to constitute separate units.

Such a conclusion is not warranted on this record. Frank Arevalo the President of Twin Terminal and Jerald Lesnick, the President of Econocaribe, were called by the General Counsel to testify concerning the relationship of said firms to SFEPA. Neither signified that they had designated SFEPA as their representative for purposes of bargaining with the ILA locals in the area, nor did they articulate any other facts indicating commitment that their employees were a part of the port-wide ILA unit. Indeed, the inclusion of these inland operators as within such a broader unit would be inconsistent with traditional Board determinations in the longshore industry, and contrary to the prevailing practice of ILA and the various steamship associations in other ports, both in terms of the nature of the employers belonging to or represented by such steamship associations as well as the competition of the employee unit on whose behalf such port-wide bargaining generally takes place. In the total circumstances, the fact that these offshore operators signed and honored the ILA contracts, does not neutralize the clear inference that Twin Terminal and Econocaribe were not a part of the unit covered by the Rules. Instead, it is concluded that both offshore firms simply signed separate agreements founded upon that negotiated by SFEPA and those separately executed documents simply covered separate appropriate units limited to their respective employees. ". . . [T]he Board has found that an employer does not become a part of a multi-employer bargaining group . . . where it merely adopts a collective-bargaining agreement in the negotiation of which it did not actually participate and which it did not authorize another to negotiate on its behalf." [98]

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[98] *Ruan Transport Corporation*, 234 NLRB 241, 242.

As neither Twin Terminal or Econocaribe consented to be a part of the multi-employer unit, the disparate treatment of these two consolidators in relation to those did not employ ILA labor, was beyond sanction of the Rules, and in furtherance of an unlawful organizational objective designed to force offshore consolidators to employ ILA members.[99] Thus, this conduct was in consonance with the principle that ". . . where an object . . . is to aid union members generally, rather than members of a unit, the object is secondary and unlawful." [100] In this instance, restricted access to container technology was not pertinent to any dispute between ILA affiliates and members of SFEPA, but invoked in quest of organization of other employees, whose employees were not represented by ILA. Said arrangement is found to have violated Section 8(e) of the Act.

IV. Conclusions of Law

A. *American Trucking Associations* 22-CE-19, et al

1. The various employers and persons, including the Charging Parties and Respondent Steamship Associations, named in Section I, pages 4-5 of this decision, are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and "persons" engaged in an industry affecting commerce within the meaning of Section 8(b)(4)(i) and (ii) of the Act.

2. Respondent ILA and its affiliates named in Section II, page 7, of this decision are labor organizations within the meaning of Section 2(5) of the Act.

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[99] *National Maritime Union of American, AFL-CIO (Commerce Tankers Corporation)*, 196 NLRB 1100.

[100] See *Meat and Highway Drivers, Local 710, Teamsters (Wilson & Co)* v. *N.L.R.B.*, 335 F.2d 709, 716.

3. Respondent Unions and Steamship Associations did not violate Section 8(e) of the Act by, on December 6, 1980, agreeing, to reimplement the Rules on Containers, effective January 1, 1981, and Respondent Unions did not violate Section 8(b)(4)(i)(ii)(A) or (B) in connection with its efforts to secure said agreement.

B. *Consolidated Express, Inc.*
221 NLRB 956

1. New York Shipping Association, Inc., Consoliated Express, Inc., and Twin Express, Inc., are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Longshoremen's Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Union did not engage in violations of Section 8(b)(4)(ii)(B) as alleged herein.

4. Respondent Union and New York Shipping Association, Inc., did not engage in violations of Section 8(e) of that Act, as alleged in the consolidated complaints herein.

C. *Dolphin Forwarding, Inc.*
236 NLRB 525

1. New York Shipping Association, Inc.; Dolphin Forwarding, Inc., and San Juan Freight Forwarders, Inc., are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Longshoremen's Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents ILA and NYSA did not violate Section 8(e) of the Act by maintaining, giving effect to or enforcing the Rules on Containers.

4. Respondent ILA did not violate Section 8(b)(4)(ii)(B), by efforts to enforce the Rules on Containers as alleged herein.

D. *Puerto Rico Marine Management, Inc.*
245 NLRB No. 171

1. Puerto Rico Marine Management, Inc., Jacksonville Maritime Association, Inc., Caldwell Shipping Company, and International Container Express, are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. International Longshoremen's Association, AFL-CIO, Local Union No. 1408, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent ILA Local 1408 did not enforce the Rules on Containers through means proscribed by 8(b)(4)(ii), or for an object proscribed by Section 8(b)(4)(ii)(B) of the Act.

E. *Associated Transport, Inc.*
231 NLRB 351

1. Houff Transfer, Inc.; Associated Transport, Inc.; Steamship Trade Association of Baltimore, CONASA, Hampton Roads Shipping Association, Tidewater Motor Truck Association, U.S. Lines, and Lavino are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. ILA, Hampton Roads District Council, Atlantic Coast District Council and Locals 333, 846, 862, 921, 957, 970, 1248, 1355, 1429, 1458, 1624, 1736, 1783, 1784, 1819, 1840 and 1970 are labor organizations within the meaning of Section 25 of the Act.

3. Respondent labor organizations and Respondents CONASA and HRSA violated Section 8(e) by enforcing the CONASA-ILA Rules on Containers under conditions precluding Associated Transport, Inc.; Houff Transfer, Inc.; Pilot Freight Carriers, Inc.; and Thurston Motor Lines, Inc., from performing work they traditionally performed as motor carriers which was not created by containerization, was not in competition with services provided by members of CONASA and HRSA, and was not

traditional work performed by deepsea ILA labor at the piers.

4. Respondent labor organizations violated Section 8(b)(4)(ii)(B) of the Act by seeking to or imposing fines against employer-members of HRSA, including U.S. Lines, and other persons for an object, to the extent found unlawful herein, of forcing said persons to cease doing business with Associated Transport, Inc., Houff Transfer, Inc., Pilot Freight Carriers, Inc., Thurston Motor Lines, Inc., and members of the Tidewater Motor Truck Association.

5. The unfair labor practices found herein have an affect upon commerce within the meaning of Section 2(6) and (7) of the Act.

F. *Hill Creek Farms, Inc.*
Case No. 4-CC-1133, et al.

1. Hill Creek Farms, B. Barks and Sons, Inc., C. F. Anderson Company, World Wide Trading Company, Delaware Operating Company and employer-members of the Philadelphia Maritime Association are employers and/or persons engaged in commerce within the meaning of Section 2(6) and (7) and Section 8(b)(4) of the Act.

2. ILA Local 1242 is a labor organization within the meaning of Section 2(5) of the Act.

3. ILA Local 1242 and PMTA have not violated 8(e) by entering into an agreement whereby employer-members of PMTA ceased doing business with Barks, Hill Creek or any other person.

4. ILA Local 1242 has not violated Section 8(b)(4)(i)(ii)(B), in connection with its conduct, forcing or requiring employer-members of PMTA to cease doing business with Hill Creek, Barks and other persons.

G. *Beck Arabia, LTD.*
245 NLRB No. 172

1. Beck Arabia, Ltd., Chesapeake Operating Company, Central Gulf Lines, Inc., and Shipside Packing Company, Inc., and each of them, is an employer engaged in commerce, and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondents, and each of them, and Local 311, are labor organizations within the meaning of Section 2(5) of the Act.

3. By instructing ILA members employed by Chesapeake not to handle goods packed by Shipside, and by coercing and restraining Chesapeake, Gulf, Beck Arabia, and other persons engaged in commerce or in an industry affecting commerce, with an object of forcing or requiring such persons to cease doing business with Shipside in connection with Shipside's performance of work not claimable by ILA, Respondents engaged in unfair labor practices in violation of Sections 8(b)(4)(i) and (ii)(B) of the Act.

4. The unfair labor practices found herein have an affect upon Commerce within the meaning of Section 2(6) and (7) of the Act.

H. *The Terminal Corporation*
250 NLRB 8

1. The Terminal Corporation, Chesapeake Operating Company, and Ceres Terminals, Inc., and each of them, are employers engaged in commerce and in operations affecting commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

2. International Longshoremen's Association, AFL-CIO, International Longshoremen's Association, Atlantic Coast District, AFL-CIO, International Longshoremen's Association, Local 333, AFL-CIO, International Long-

shoremen's Association, Local 953, AFL-CIO, collectively referred to here as the Respondents, and each of them, are labor organizations within the meaning of Section 2(5) of the Act.

3. By inducing and encouraging employees of Chesapeake and Ceres not to handle goods stuffed by Terminal, goods consigned to Terminal for performance of work not subject to legitimate claim under the rules on containers, and by coercing and restraining Chesapeake and Ceres, with an object of forcing or requiring Chesapeake, with respect to such work, to cease doing business with Terminal, Respondents engaged in unfair labor practices affecting commerce in violation of Section 8(b)(4)(i)(ii)(B) of the Act.

4. Respondents did not violate Section 8(b)(4)(i)(ii)(B) by inducing and encouraging employees of Chesapeake and Ceres not to handle goods stuffed by Terminal, which is work lawfully assigned to deepsea ILA labor under the Rules on Containers, even though, an object of such pressures was to force Chesapeake and Ceres to cease doing business with Terminal.

5. The unfair labor practices found herein have an affect upon commerce within the meaning of Section 2(6) and (7) of the Act.

I. *Custom Brokers and Forwarders Association of Miami, Inc.*
Case No. 12-CE-30

1. Custom Brokers and Forwarders Association of Miami, Inc. and Southeast Florida Employers Port Association are employers within the meaning of Section 2(6) and (7) of the Act.

2. ILA Locals 1406; 1406-A; 1680; 1526; 1526-A; and 1922, AFL-CIO, are labor organizations within the meaning of Section 2(6) and (7) of the Act.

3. Respondent Unions and Respondent SFEPA violated Section 8(e) of the Act insofar as they have enforced an agreement or arrangement as an organization device, whereby Respondent SFEPA have refused to do business with employers not employing ILA labor but has continued to do business with employers, not within the primary work unit, but who employ ILA labor.

4. The unfair labor practices found herein have an affect upon commerce within the meaning of Section 2(6) and (7) of the Act.

V. The Remedy

Having found that violations were not substantiated in *American Trucking Associations, supra; Consolidated Express, Inc., supra; Dolphin Forwarding, Inc., supra; Puerto Rico Marine Management, Inc., supra,* and *Hill Creek Farms, Inc.; supra,* it shall be recommended that the complaints therein be dismissed in their entirety.

In the remaining cases, violations have been reaffirmed in *Associated Transport, Inc.; supra, Beck Arabia, Ltd., supra,* and the *Terminal Corp.; supra.* However, the original remedies issued in those cases were founded upon the Board's theory that the Rules on Containers were unlawful on their face as universally embodying a proscribed work acquisition objective. Having found herein that the Rules are not *per se* unlawful, but that, in particular circumstances, they have been unlawfully applied, it shall be recommended that these pending orders be modified so as to preserve the legitimate aspects of the Rules.

As indicated, the final case, *Custom Brokers and Forwarders Association of Miami, Inc., supra,* was dismissed by the Administrative Law Judge. However, having found herein that Respondents in that case gave effect to an arrangement in violation of 8(e) whereby a preference was accorded to off pier operators employing

ILA members over those that did not, it shall be recommended that Respondents therein cease and desist from entering, maintaining or enforcing any such arrangement as an aid to Respondent Unions' organizational objectives. However, for remedial purposes, it is noted that this unlawful practice with respect to container distribution is one not countenanced either by the literal terms of the Rules on Containers or the negotiating history which led to their adoption in the Port of Miami. Hence, the remedy recommended herein is addressed to the illicit practice only, without disturbing the job security interests otherwise rightfully conferred, by virtue of the Rules, upon deepsea ILA labor in that Port.

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record in this consolidated proceeding and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: [101]

VI. Revised Supplemental Order

Associated Transport, Inc.
Cases 5-CC-791, 5-CE-48, et al

A. Respondents International Longshoremen's Association, AFL-CIO, Hampton Roads District Council, International Longshoremen's Association, AFL-CIO, Atlantic Coast District Council, International Longshoremen's Association, AFL-CIO, ILA Locals 333, 846, 862, 921, 953, 970, 1248, 1355, 1429, 1458, 1624, 1736, 1783, 1784, 1819, 1840 and 1970, AFL-CIO, their officers, agents, and successors shall:

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[101] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Giving effect to and enforcing the contracts and agreements known as the CONASA-ILA rules on containers to the extent and in the manner said applications have been found to be unlawful herein.

(b) Continuing to seek or impose fines against employer-members of HRSA, including U.S. Lines, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require such persons to cease doing business with Associated Transport, Inc., Houff Transfer Inc., Pilot Freight Carriers, Inc., Thurston Motor Lines, Inc., or any other employer-member of Tidewater Motor Truck Association, provided that, the terms hereof, shall only apply with respect to the practice of said motor carriers whereby import containers are stripped for their exclusive benefit, as an incident of traditional motor carrier practice, neither created by containerization, nor rivaled by services provided by marine operators or at the pier by deepsea ILA labor.

(c) Coercing or restraining CONASA, HRSA, or any of HRSA's employer-members, or any other person engaged in commerce in an industry affecting commerce, where an object thereof is to force or require such persons to cease doing business with Associated Transport, Inc., Houff Transfer, Inc., Pilot Freight Carriers, Inc., Thurston Motor Lines, Inc., or any other employer-members of Tidewater Motor Truck Association, provided that, the terms hereof, shall only apply with respect to the practice of said motor carriers whereby import containers are stripped for their exclusive benefit as an incident of traditional motor carrier practice, neither created by containerization nor rivaled by services traditionally rendered by marine operators and performed at the pier by deepsea ILA labor.

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(a) Notify all of their members who are employed by employer-members of HRSA that the CONASA-ILA rules on containers which have been negotiated between ILA and CONASA on behalf of HRSA may not be enforced to restrain, restrict, limit, fine, or prohibit handling containers with respect to Associated Transport, Inc., Houff Transfer, Inc., Pilot Freight Carriers, Inc., Thurston Motor Lines, Inc., or any other employer-member of Tidewater Motor Truck Association, to the extent that those containers are stripped as an incident of traditional motor carrier practice, for the exclusive benefit of motor carriers, pursuant to their traditional practice, not rivaled by services traditionally rendered by motor operators and performed at the piers by deepsea ILA labor.

(b) Post at all of their respective business offices, meeting halls, and dispatch halls copies of the attached notice marked "Appendix B".[102] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by a representative of each Respondent labor organization named in this section of the Order, shall be posted by each of the said labor organizations immediately upon receipt thereof, and be maintained by each of them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by said labor organizations to insure that these notices are not altered, defaced, or covered by any other material.

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[102] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps each of said labor organization has taken to comply herewith.

B. Respondents Council of North Atlantic Shipping Associations, (CONASA), and Hampton Roads Shipping Association (HRSA), their respective officers, agents, successors, and assigns, shall:

1. Cease and desist from giving effect to, and enforcing the contracts and agreements known as the CONASA-ILA Rules on Containers to the extent and in the manner said application has been found to be unlawful herein.

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(a) HRSA shall notify U.S. Lines and all other empyoyer-members of HRSA that the CONASA-ILA rules on containers, which have been negotiated between ILA and CONASA on behalf of HRSA may not be enforced to restrain, restrict, limit, or prohibit handling containers with respect to Associated Transport, Inc., Pilot Freight Carriers, Inc., Thurston Motor Lines, Inc., or any other employer-member of Tidewater Motor Truck Association, to the extent that said containers are stripped, for the exclusive benefit of motor carriers, pursuant to their traditional practice, not rivaled by services traditionally rendered by marine operators and performed by deepsea ILA labor.

(b) CONASA shall notify U.S. Lines and all other members of HRSA that the CONASA-ILA rules on containers which have been negotiated between ILA and CONASA on behalf of HRSA may not be enforced to restrain, restrict, limit, or prohibit handling in the customary manner, containers with respect to Associated Transport, Inc., Pilot Freight Carriers, Inc., Thurston Motor Lines, Inc., or other employer-member of Tide-

water Motor Truck Association, to the extent that said containers are stripped, for the exclusive benefit of motor carriers, pursuant to their traditional practice, not rivaled by services traditionally rendered by marine operators and performed by deepsea ILA labor.

(c) HRSA shall mail to U.S. Lines and each of HRSA's other employer-members, and post at its Norfolk, Virginia, office copies of the attached notice marked "Appendix C."[103] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by the Respondent HRSA's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employer-members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) CONASA shall mail to HRSA, U.S. Lines, and each of the other employer-members of HRSA, and post at CONASA's main office in New York, New York, copies of the attached notice marked "Appendix D".[104] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respond-

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[103] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[104] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

ent CONASA's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to member associations are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, with steps Respondents CONASA and HRSA have taken to comply herewith.

Beck Arabia, Ltd.

Respondent International Longshoremen's Association, AFL-CIO, International Longshoremen's District Council, Baltimore, Maryland, International Longshoremen's Association, Local 953, and International Longshoremen's Association, Local 333, their officers, agents and representatives, shall:

1. Cease and desist from inducing or encouraging individuals employed by Chesapeake Operating Company or by other persons engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or threatening, coercing, or restraining Chesapeake Operating Company, Central Gulf, Beck Arabia, or any other persons engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is to require the above-named persons, or any other person, to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with Shipside Packing Company, Inc., or any other person, but only to the extent that said persons are not engaged in work lawfully

claimable by Respondents as set forth in the attached Decision of the Administrative Law Judge.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Notify members of International Longshoremen's Association, Locals 333 and 953, that Respondents have no objection to loading of containers that have been stuffed by Shipside Packing Company, Inc., to the extent that said container handling is performed in conjunction with traditional general warehousing practices of marshalling, storing, picking and packing on a continuing basis for a single shipper, of inland accumulations of cargo for export.

(b) Notify members of International Longshoremen's Association, Locals 333 and 953, that any previous instructions, requests, or appeals which Respondents have made against loading or unloading cargo for or from Shipside Packing Company, Inc., have been withdrawn, to the extent that they apply to the handling of containers for such purposes.

(c) Post in conspicuous places in the Respondents' business offices and meeting halls copies of the attached notice marked "Appendix E".[105] Copies of said notice, on forms provided by the Regional Director for Region 5, shall after being duly signed by the Respondents' representative, be posted by the Respondents immediately upon receipt thereof, and maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the

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[105] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Respondents to insure that the said notices are not altered, defaced, or covered by any other material.

(d) Mail to the Regional Director for Region 5 sufficient signed copies of the aforementioned notice for posting by Chesapeake and Shipside, those companies willing, at all places where notices to their respective employees are customarily posted.

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

The Terminal Corporation

The Respondents, International Longshoremen's Association, AFL-CIO, International Longshoremen's Association, Atlantic Coast District, AFL-CIO, International Longshoremen's Association, Local 333, AFL-CIO, International Longshoremen's Association, Local 953, AFL-CIO, individually and collectively, their officers, agents, and representatives, shall:

1. Cease and desist from inducing or encouraging individuals employed by Chesapeake Operating Company, Ceres Terminals, Inc., or any other persons engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or threatening, coercing, or restraining Chesapeake Operating Company, Ceres Terminals, Inc., or any other persons engaged in commerce or in an industry affecting commerce, where an object thereof is to require the above-named persons, or any other person, to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with the Terminal Corporation, or any other person, to the extent found unlawful herein.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Notify members of International Longshoremen's Association, AFL-CIO, International Longshoremen's Association, Atlantic Coast District, AFL-CIO, International Longshoremen Association, Local 333, AFL-CIO, International Longshoremen's Association, Local 953, AFL-CIO, that the Respondents have no objection to the stripping of cargo from containers by The Terminal Corporation, insofar as such container handling is in conjunction with traditional general warehousing functions of indefinite storage *and* deferred, partial distribution, performed pursuant to a continuing relationship with an exporter or consignee.

(b) Notify members of International Longshoremen's Association, AFL-CIO, International Longshoremen's Association, Atlantic Coast District, AFL-CIO, International Longshoremen's Association, Local 333, AFL-CIO, International Longshoremen's Association, Local 953, AFL-CIO, that any previous instructions, orders requests, or appeals which the Respondents have made against unloading or releasing containers for or to The Terminal Corporation have been withdrawn, to the extent that such containers are to be stripped in conjunction with traditional general warehousing functions of indefinite storage, *and* deferred, partial distribution pursuant to a continuing relationship with an exporter or consignee.

(c) Post at conspicuous places in the Respondents' business offices and meeting halls copies of the attached notice marked "Appendix F".[106] Copies of said notice, on forms

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[106] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

provided by the Regional Director for Region 5, after being duly signed by the Respondents' representatives, shall be posted by the Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(d) Mail to the Regional Director for Region 5 sufficient signed copies of the aforementioned notice for posting by Chesapeake, Ceres, and Terminal, those companies willing, at all places where notices to their respective employees are customarily posted.

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

Custom Brokers and Forwarders Association of Miami, Inc.

A. Respondents International Longshoremen's Association, Locals 1416; 1416-A; 1680; 1526; 1526-A and 1922, AFL-CIO, Miami, Florida, individually and collectively, their officers agents and representatives, shall:

1. Cease and desist from giving effect to any agreement, arrangement or plan, express or implied whereby members of Southeast Florida Port Association are to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with members of Custom Brokers and Forwarders Association of Miami, Inc., or any other person, to the extent that such an agreement, arrangement or plan is invoked as an aid to organizing employees and encouraging their membership in the International Longshoremen's Association, or its affiliates.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act herein:

(a) Notify all members who are employed by employer-members of Southeast Florida Employers Port Association that they will not seek to participate in, or in any manner enforce any arrangement whereby access to maritime containers will be afforded to or denied to members of Custom Brokers and Forwarders Association of Miami, Inc. or any other person engaged in work off the piers, on the basis of whether they do or do not employ members of the International Longshoremen's Association or its affiliates.

(b) Post at their offices and meeting halls copies of the attached notice marked "Appendix G".[107] Copies of said notice to be provided by the Regional Director for Region 12 after being signed by an authorized representative of the Respondent Unions shall be posted immediately upon receipt thereof and be maintained by them for a period of 60 days thereafter in conspicuous places including all places where notices to its members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(c) Sign and mail sufficient copies of said notices to the Regional Director for Region 12 for posting by Custom Brokers and Forwarders Association of Miami, Inc., if they be willing, at all places where notices to their members or employees are customarily posted.

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[107] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(d) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order what steps Respondent has taken to comply herewith.

B. Respondent Southeast Florida Employers Port Association, Coordinated Carribean Transport, Inc.; Chester, Blackburn & Roder, Inc.; Eagle, Inc.; Eller & Company, Inc.; Harrington & Company, Inc.; Strachen Shipping Company, and Marine Terminals, Inc., Miami, Florida, their officers, agents, successors and assigns, shall:

1. Cease and desist from giving effect to any agreement, arrangement or plan, express or implied, whereby employer-members of Southeast Florida Employers Port Association or to cease handling, transporting, or otherwise dealing in the products of any other processor, or to cease doing business with members of Custom Brokers and Forwarders Association of Miami, Inc., or any other person, to the extent that such an agreement, arrangement or plan is invoked as an aid to organizing employees and encouraging their membership in the International Longshoremen's Association, or its affiliates.

2. Take the following affirmative action which is deemed necessary to effectuate the purposes and policies of the Act:

(a) Notify all their members and employees that they will not participate in or enforce any arrangement, agreement or plan, express or implied, whereby access to maritime containers is afforded or denied to members of Custom Brokers and Forwarders Association of Miami, Inc., or any other person engaged in work off the piers, on the basis of whether they do or not not employ members of the International Longshoremen's Association or its affiliates.

(b) Post in their offices in the Port of Miami, Florida, copies of the attached notice marked "Appendix H".[108]

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[108] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the no-

Immediately upon receipt of said notices, on forms to be provided by the Regional Director for Region 12, the Respondents shall cause the copies to be signed by one of their authorized representatives and posted, the posted copies to be maintained for a period of sixty consecutive days thereafter in conspicuous places, including all places where notices to members and employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 12, in writing, within twenty days from the date of this Order, what steps the Respondents have taken to comply herewith.

IT IS HEREBY FURTHER ORDERED that the complaints consolidated herewith in *Dolphin Forwarding, Inc.*, Cases 2-CC-1364, 2-CC-1365, 2-CE-75; *Hill Creek Farms*, Inc., Cases 4-CC-1133 and 4-CE-55; *Puerto Rico Marine Management, Inc.*, Cases 12-CC-1002 and 12-CC-1004; *Consolidated Express, Inc.*, 22-CC-541, 22-CC-554, 22-CE-19, 22-CE-20; and *American Trucking Associations, Inc.*, Cases 22-CC-806, 22-CC-807, 22-CC-808, 22-CC-809, 22-CC-810, 22-CE-44, 22-CE-45, 22-CE-46, 22-CE-47 and 22-CE-48, be, and they hereby are, dismissed in their entirety.

Dated, Washington, D.C. September 29, 1981

/s/ Joel A. Harmatz
JOEL A. HARMATZ
Administrative Law Judge

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tice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX A(i)

NYSA—ILA SETTLEMENT TERMS—1959

8. *Containers:—Dravo size or Larger*

(a) Any employer shall have the right to use any and all type of containers without restriction or stripping by the union.

(b) The parties shall negotiate for two weeks after the ratification of this agreement, and if no agreement is reached, shall submit to arbitration in the manner described in paragraph 13 below, the question of what should be paid on containers which are loaded or unloaded away from the pier by non-ILA labor, such submission to be within 30 days thereafter.

(c) Any work performed in connection with the loading and discharging of containers for employer-members of the NYSA which is performed in the Port of Greater New York whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at longshore rates.

APPENDIX A(ii)

NYSA—ILA SETTLEMENT TERMS—1969

Containerization—a new Clause which in the case of the Port of New York shall be the addition of a new subparagraph to Clause XII, Paragraph 2.

(c) Containers owned or leased by employer-members (including containers on wheels) containing LTL loads or consolidated full-container loads, which are destined for or come from, any person (including a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo, and which either comes from or is destined to any point within a 50 mile radius from the center of any North Atlantic District port shall be stuffed and stripped by ILA labor at longshore rates on a waterfront facility under the terms and conditions of the General Cargo Agreement. (Rules on Containers are attached.)

RULES ON CONTAINERS

The following provisions are intended to protect and preserve the work jurisdiction of longshoremen and all other ILA crafts at deepsea piers or terminals. To assure compliance with the collective bargaining provisions the following rules and regulations shall be applied:

Rule 1. Definitions and Rule as to Containers Covered

Stuffing—means the act of placing cargo into a container.

Stripping—means the act of removing cargo from a container.

Loading—means the act of placing containers aboard a vessel.

Discharging—means the act of removing containers from a vessel.

These provisions relate solely to containers meeting each and all of the following criteria:

(a) Containers owned or leased by employer-members (including containers on wheels) which contain LTL loads or consolidated full container loads.

(b) Such containers which come from or go to any person (including a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo.

(c) Such containers which come from or go to any point within a geographical area of any port in the North Atlantic District described by a 50-mile circle with its radius extending out from the center of each port.

Rule 2. Rule of Stripping and Stuffing Applied to Such Containers

A container which comes within each and all of the criteria set forth in Rule 1 above shall be stuffed and stripped by ILA longshore labor. Such ILA labor shall be paid and employed at longshore rates under the terms and conditions of the General Cargo Agreement. Such stuffing and stripping shall be performed on a waterfront facility, pier or dock. No container of cargo shall be stuffed or stripped by ILA longshore labor more than once. Notwithstanding the above provisions, LTL loads or consolidated container loads of mail, or household goods with no other type of cargo in the container, and of personal effects of military personnel shall be exempt from the rule of stripping and stuffing.

Rule 3. Rules on No Avoidance or Evasion

The above rules are intended to be fairly and reasonably applied by the parties. To obtain nondiscriminatory and fair implementation of the above, the following principles shall apply:

(a) Agreement in the Port as to the geographic area as provided in Rule 1-(c) is based on present LTL movement patterns in the port. Should any person, firm or corporation, for the purpose of evading the provisions of Rule 2 hereof, seek to change such pattern by shifting its operations to, or commencing new operations at, a point outside said agreed-upon geographic area, then either party may raise the question whether said point should be included within the said geographic area, and upon agreement that the purpose of the shift in its operations was to evade the provisions of Rule 2, then said point shall be deemed to be within the said geographic area for the purpose of these rules.

(b) Containers owned or leased by companies which are affiliated either directly or through a holding company with an employee-member shall be deemed to be containers owned or leased by employer-members. Affiliation shall include subsidiaries and/or affiliates which are effectively controlled by the employer-member, its parent, or stockholders of either of them.

(c) It shall be the obligation of employer-members to clearly mark each container's documentation as to whether or not it is a Rule 1 container which is to be stuffed and stripped at the waterfront facility (pier or dock).

(d) Each employer-member shall keep records of each container supplied to a consolidator or other

non-owner of cargo, located within the agreed geographic area, and such record shall be available to the Committee provided in (g) below. With respect to all containers received at or delivered from the waterfront facility (pier or dock), a record of the same shall be made by ILA Checkers or Clerks.

(e) Failure to stuff or strip a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provisions of Rule 2, shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been stuffed or stripped under the rules then the steamship carrier shall pay to the joint Welfare Fund liquidated damages of $250 per container which should have been stuffed or stripped.

(f) If any shippers or their agents who have at any time used, are now using, or in the future use containers owned or leased by employer-members, hereafter use containers not owned or leased by employer-members, for the purpose of evading the provisions of Rule 2 hereof, then the containers so used shall be considered to be within Rule 1 and Rule 2.

(g) A committee represented equally by management and union shall be formed and shall have the responsibility and power to hear and pass judgment on any violations of these rules. Any inability to agree shall be processed as a grievance under the applicable contract except as limited by 3(h) hereof.

(h) If the purpose of protecting and preserving the present work jurisdiction of longshoremen and

all other deepsea ILA crafts over any containers loaded with LTL cargo, or consolidated full container loads as defined herein is not accomplished by the provisions of these rules on containers, then either party shall have the right to renegotiate these provisions or any part thereof by giving notice to the other party. This provision shall not be subject to arbitration. Pending renegotiation and settlement of the given dispute, the employees may decline to work any containers involved in the dispute and such refusal to work shall not be subject to arbitration. The renegotiation referred to above will not be subject to arbitration. Interpretation of this provision shall not be determined by an arbitrator but by a court of competent jurisdiction.

Container Royalty

The rate of contributions now in effect shall continue.

APPENDIX A(iii)

CONASA—ILA MEMORANDUM OF AGREEMENT—1972

The following is agreed to by CONASA and ILA in final and complete settlement of the seven (7) Master Contract issues, subject to such regulatory approvals as may be necessary:

* * * * *

6. CONTAINERIZATION

Container Royalty—An additional container royalty equal to the present container royalty of 35¢, 70¢ and $1.00 per gross ton payable as provided in the November 16, 1960 Stein Award to be used for fringe benefit purposes only, other than supplemental cash benefits, which purposes are to be determined locally on a port by port basis.

RULES ON CONTAINERS

Rule 1. Definitions and Rule as to Containers Covered

* * * * *

(b) Such containers which come from or go to any person (including [but not limited to] a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo.

* * * * *

Rule 3. Rules on No Avoidance or Evasion

* * * * *

(c) It shall be the obligation of employer-members to clearly mark each container's documentation as to whether or not it is a Rule 1 container which is to be stuffed and stripped at the waterfront facility (pier or dock). [If a container is not clearly marked it shall be deemed a Rule 1 container, and it shall be stuffed or stripped.]

* * * * *

(e) Failure to stuff or strip a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provisions of Rule 2 shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been stuffed or stripped under the rules, then the steamship carrier shall pay, to the joint [Container Royalty Fund], liquidated damages of [$1,000 per container which should have been stuffed or stripped. [Such damages shall be used for the same purposes as the first Container Royalty is used in each port. If any carrier does not pay liquidated damages within 30 days after exhausting its right to appeal the imposition of liquidated damages to the Committee provided in (g) below, the ILA shall have the right to stop working such carrier's containers until such damages are paid.

APPENDIX A(iv)

CONASA—ILA CONTAINER COMMITTEE

INTERPRETATIVE BULLETIN NO. 1

In accordance with the resolution made at the January 29, 1973 meeting of the CONASA-ILA Container Committee, directing that all interpretations be issued by the CONASA-ILA Container Committee office and promulgated to all local Port Container Committees as well as all other interested parties, Interpretative Bulletins will be issued periodically by the CONASA-ILA Container Committee for the information of all interested parties.

This document is the first such Interpretative Bulletin and sets forth the determinations reached by the CONASA-ILA Container Committee at its meetings of September 11-13, 1972, and at its meetings of January 25-29, 1973.

No person or representative is authorized to issue any interpretations other than the Port Container Committees in each CONASA port subject to review by the full CONASA-ILA Container Committee in cases of conflict. The CONASA-ILA Container Committee will issue further clarifications and interpretations only at the request of members of one of the CONASA Port Associations or an official of an ILA Local Union. Interpretations and clarifications will not be issued to any party not covered by the various Collective Bargaining Agreements. Requests, in writing, for clarifications and interpretations should be addressed to the CONASA-ILA Container Committee at the above address.

The CONASA-ILA Container Committee has issued the following interpretations and definitions as of the date of this Bulletin:

INTERPRETATION 1.1

Containers Covered

The rules on containers relate solely to containers meeting either of the following criteria:

(a) Containers owned or leased by carriers (including containers on wheels) which contain LTL loads or consolidated full container loads, which come from or go to any point within a geographical area of any port in the North Atlantic District described by a 50-mile circle with its radius extending out from the center of each port.

(b) Containers which come from or go to any person (including a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not a beneficial owner of the cargo and such containers come from or go to any point within a geographical area of any port in the North Atlantic District described by a 50-mile circle with its radius extending out from the center of each port.

INTERPRETATION 1.2

Batching

When an employer member or carrier uses a trucker to remove or deliver containers in batches, or in substantial number, from or to a terminal to another place of rest (outside of its terminal) where containers are stored pending their delivery to consignee (or after being received from a shipper and while awaiting the arrival of a ship), for the purpose of reducing the work jurisdiction of the ILA or any of its crafts (and when adequate

physical space exists on the facility for storage of such containers), such use is deemed to be batching and is a violation of the CONASA-ILA contract.

INTERPRETATION 1.3

Warehousing

A beneficial owner does not violate the Rules on Containers when he warehouses his goods in bona fide public warehouse under the following conditions:

1. The container cargo is warehoused at a bona fide public warehouse.
2. The beneficial owner pays the normal labor charges in and out; and the normal warehouse storage fees for a minimum period of thirty or more days; and
3. The cargo is being warehoused (a) in the normal course of the business of the beneficial owner; (b) title to such goods has not been transferred from the beneficial owner to another; and (c) it is contemplated that such transfer of title will not take place for at least 30 days after the warehousing of the cargo. This exception shall not apply where cargo is warehoused for the purpose of avoidance or evasion of Rule 1.
4. The beneficial owner furnishes all documentation and other information which permits the Container Committee in the port to determine whether conditions 1, 2 and 3 have been met.
5. This definition is limited to containers warehoused as provided in the above conditions and any warehouse which does not conform to such conditions shall be deemed a distribution station and treated accordingly.

INTERPRETATION 1.4

Beneficial Owner

The beneficial owner is the ultimate owner entitled to the beneficial use, enjoyment and title of the property. The term ultimate owner refers to one using the cargo in the normal course of his business but it does not include a broker, distributor, consolidator, trucker, forwarder, warehouseman or the ultimate consumer.

INTERPRETATION 1.5

Headload

Where a single beneficial owner sends a container (either export or import) which contains all of his own cargo to a carrier's pier and such container is not full, the carrier may chock this container with additional cargo and at arrival at another port the carrier may strip the additional cargo and send the remaining cargo to the beneficial owner. The chocking or stripping at ILA ports shall be performed at a pier by deepsea ILA labor.

INTERPRETATION 1.6

Enforcement of Rules on Containers

The following standards are hereby promulgated to assure fair and non-discriminatory enforcement of the CONASA-ILA Rules on Containers

1. (a) All outbound (export) consolidated or LTL container loads (Rule 1 containers) shall be stripped from the container at the pier by deepsea ILA labor and cargo shall be stuffed into a different container for loading aboard ship.

   (b) All inbound (import) consolidated or LTL cargo (Rule 1 containers) for distribution shall be stripped from the container and the cargo

placed on the pier where it will be delivered and picked up by each consignee.

2. No carrier or direct employer shall supply its containers to any facilities operated in violation of the Rules on Containers including but not limited to a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder who is either a consolidator or a distributor. No carrier or direct employer shall operate a facility in violation of the Rule on Containers which specifically require that all containers be stuffed or stripped at a waterfront facility (pier or dock) where vessels normally dock.

A list shall be maintained of consolidation and distribution stations which are operated in violation of the Rules for the information of all carriers and direct employers. Any container consolidated at or distributed from such facilities shall be deemed a violation and subject to the rules on stuffing and stripping.

3. A committee of carriers, together with CONASA-ILA Container Committee, will develop uniform documentation which shall be required to be prepared and maintained by all carriers in order to readily identify all Rule 1 containers which are subject to stuffing and stripping by deepsea ILA labor.

4. All carriers will distribute to all other carriers any and all information and devices which are being used by any persons to circumvent the Rules on Containers. Any carrier whose attention is brought to a violation of the Rules shall immediately cease such violation and report the matter to the appropriate CONASA-ILA Container Committee in its port.

5. The Container Committee in each CONASA port shall promulgate to all carriers and direct employers, and to the Container Committees in each CONASA port, any and all interpretations of the Rules on Containers as and when they are made. This will include uniform interpretations as and when they are issued by the CONASA-ILA Container Committee.

6. Any facility operated in violation of the Container Rules will not have service supplied to it by any direct employer and the ILA will not supply labor to such facility.

INTERPRETATION 1.7

Overland Movement of Containers from CONASA Port to Non-CONASA Port

If a steamship line moves containers from a CONASA port to a non-CONASA port for the purpose of evading the rules on containers, the line is in violation of the CONASA-ILA Agreement. If the cargo is being moved to the non-ILA port to meet the requirements of local market conditions, and not for the purpose of evasion, then such movement is not within the rules.

INTERPRETATION 1.8

Importers Advertising Evasion of Rules

The ILA brought to the attention of CONASA that certain importers were circulating, in writing, methods developed by them to evade the rules on containers by issuing single bills of lading on what are in fact consolidated container loads of many beneficial owners. CONASA and ILA agreed that such evasion would be stopped wherever it was found.

(c) Every import container destined to a point within 50-miles of a CONASA Port shall be

delivered only on a delivery order. Every export container coming from a point within 50-miles of a CONASA Port shall be received only on a dock/cargo receipt. Such delivery orders and dock/cargo receipts shall certify the place of delivery and origin of the container, the name or names of the person to whom the cargo is being delivered and from which it is shipped, the identity of the owner of the cargo, weight of the cargo, identity of the cargo and the origin and final destination of the container. Copies of such delivery order and dock/cargo receipts shall be available to the local port Container Committee and the policing agency provided for in (e) below.

(d) The Container Committee in each CONASA Port shall promulgate to all carriers and direct employers, and to the Container Committees in each CONASA Port, any and all interpretations of the Rules on Containers as and when they are made. This will include uniform interpretations as and when they are issued. The CONASA-ILA Container Committee shall also promulgate uniform interpretations to local port Container Committees, as and when they are issued.

(e) Policing Agency—Each CONASA Port shall establish a method of policing and enforcing these Rules on a uniform and non-discriminatory basis. No such method shall be implemented until presented to and approved by the joint CONASA-ILA Container Committee.

Rule 10—Container Royalty Payments

The two Container Royalty payments required by the CONASA-ILA collective bargaining agreements shall be

payable only once in the Continental United States. They shall be paid in that ILA Port where the container is first handled by ILA longshore labor at longshore rates. The second container royalty payment (provided by paragraph 6 of the 1971-1974 CONASA-ILA Memorandum of Agreement) shall be continued and shall be used for fringe benefit purposes only, other than supplemental cash benefits, which purposes are to be determined locally on a port by port basis. Containers originating at a foreign port which are transhipped at a United States port for ultimate destination to another foreign port ("foreign sea-to-foreign-sea containers") are exempt from the payment of container royalties.

APPENDIX A(v)

CONASA-ILA RULES ON CONTAINERS—1974

PREAMBLE

This Agreement made and entered into by and between the carrier and direct employer members of the CONASA Port Associations (hereinafter referred to collectively as "CONASA") and the International Longshoremen's Association, AFL-CIO ("ILA"), its Atlantic Coast District ("ACD") and its affiliated local unions in each CONASA port ("locals") covers all container work at a waterfront facility which includes but is not limited to the receiving and delivery of cargo, the loading and discharging of said cargo into and out of containers, the maintenance of containers, and the loading and discharging of containers on and off ships.

CONASA agrees that it will not directly perform work done on a container waterfront facility (as hereinafter defined) or contract out such work which historically and regularly has been and currently is performed by employees covered by CONASA-ILA Agreements, including CONASA-ILA craft agreements, unless work on such container waterfront facility is performed by employees covered by CONASA-ILA Agreements.

RULES

The following provisions are intended to protect and preserve the work jurisdiction of longshoremen and all other ILA crafts which was performed at deepsea waterfront facilities. These rules do not have any effect on work which historically was not performed at a waterfront facility by deepsea ILA labor. To assure compliance with the collective bargaining provisions, the following rules and regulations shall be applied uniformly in

all CONASA Ports to all import or export cargo in containers:

Definitions

(a) Loading a Container	—means the act of placing cargo into a container.
(b) Discharging a Container	—means the act of removing cargo from a container.
(c) Loading Containers on a vessel	—means the act of placing containers aboard a vessel.
(d) Discharging Containers from a vessel	—means the act of removing containers from a vessel.
(e) Waterfront facility	—means a pier or dock where vessels are normally worked including a container compound operated by a carrier or direct employer.
(f) Qualified Shipper	—means the manufacturer or seller having a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the export cargo being transported and who is named in the dock/cargo receipt.
(g) Qualified Consignee	—means the purchaser or one who otherwise has a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the import cargo being transported and who is named in the delivery order.
(h) Consolidated Container Load	—means the container load of cargo where such cargo belongs to more than one shipper on export cargo or one consignee on import cargo.

Rule 1—Containers To Be Loaded Or Discharged by Deepsea ILA Labor

(a) Cargo in containers referred to below shall be loaded into or discharged out of containers at a waterfront facility by deepsea ILA labor:

(1) Containers owned, leased or used by carriers (including containers on wheels and trailers), hereinafter "container", which contain consolidated container loads, which come from or go to any point within a geographic area of any CONASA port described by a 50-mile circle with its radius extending out from the center of each port, (hereinafter "geographic area") or

(2) Containers which come from a single shipper which is not the manufacturer ("manufacturer's label") into which the cargo has been loaded (consolidated) by other than its own employees and such containers come from any point within the "geographic area," or

(3) Containers designated for a single consignee from which the cargo is discharged (deconsolidated) by other than its own employees within the "geographic" area and which is not warehoused in accordance with Rule 2(B).

(b) Such ILA labor shall be paid and employed at deep-sea longshore rates under the terms and conditions of the deep-sea ILA labor agreement in each CONASA port, including the provisions for all fringe benefits and any and all other benefits receivable by deep-sea ILA craft workers in each such Port. No cargo shall be loaded into or discharged out of any container by ILA deep-sea labor more than once.

(c) All export consolidated cargo, described in 1(a) (1) and (2) above, shall be received at the waterfront

facility by deep-sea ILA labor and such cargo shall be loaded into a container at the waterfront facility for loading aboard ship.

(d) All import consolidated cargo, described in 1(a) (1) and (3) above, shall be discharged from the container and the cargo placed on the waterfront facility where it will be delivered and picked up by each consignee.

(e) No carrier or direct employee shall supply its containers to any consolidator or de-consolidator. No carrier or direct employer shall operate a facility in violation of the Rules on Containers which specifically require that all Rule 1 containers be loaded or discharged at a waterfront facility.

Rule 2—Containers Not to be Loaded or Discharged by ILA labor

Cargo in containers referred to below shall not be loaded or discharged by ILA labor:

A. Export Cargo:

(1) All cargo loaded in containers outside the "geographic area".

(2) Containers loaded with cargo at a qualified shipper's facility with its own employees.

(3) Containers loaded with the cargo of a single manufacturer (manufacturer's label).

(4) Consolidated container loads of mail, household effects of a person who is relocating his place of residence, with no other type of cargo in the container, or personal effects of military personnel.

B. Import Cargo:

(1) All cargo discharged from containers outside the "geographic area".

(2) Containers discharged at a qualified consignee's facility by its own employees.

(3) Consolidated container loads of mail, household effects of a person who is relocating his place of business, with no other type of cargo in the container, or personal effects of military personnel.

(4) Containers of a qualified consignee discharged at a bona fide public warehouse within the "geographic area" which comply with all of the following conditions:

1. The container cargo is warehoused at a bona fide public warehouse;

2. The qualified consignee pays the normal labor charges in and out; and the normal warehouse storage fees for a minimum period of thirty or more days; and

3. The cargo being warehoused (a) in the normal course of the business of the qualified consignee; (b) title to such goods has not been transferred from the qualified consignee to another.

The carrier on request will furnish all documentation and other information which permits the Container Committee in the port to determine whether conditions 1, 2 and 3 have been met. This exception shall not apply where cargo is warehoused for the purpose of avoidance or evasion of Rule 1. It is limited to containers warehoused as provided in the above conditions and any warehouse which does not conform to such conditions shall be deemed a consolidator or de-consolidator.

Rule 3—Batching

When an employer-member or carrier uses a trucker to remove or deliver containers in batches, or in substan-

tial number, from or to a terminal to another place of rest (outside of its terminal) where containers are stored pending their delivery to a consignee (or after being received from a shipper and while waiting the arrival of a ship), for the purpose of reducing the work jurisdiction of the ILA or any of its crafts, such use is deemed to be batching and an evasion of these Rules in violation of the CONASA-ILA contract.

Rule 4—Headload

Where a single qualified shipper sends an export container which contains all of his own cargo to a waterfront facility and such container is not full, the carrier or direct employer may load this container with additional cargo at the waterfront facility. On import cargo, the carrier or direct employer may discharge any such additional cargo and send the remaining cargo in the container to the qualified consignee. The loading or discharging of cargo at ILA ports shall be performed at a waterfront facility by deep-sea ILA labor.

Rule 5—Overland Movement of Containers from CONASA Port to Non-CONASA Port

If a carrier moves containers from a CONASA Port to a non-CONASA Port for the purpose of evading the Rules on Containers, the carrier is in violation of the CONASA-ILA Agreement. If the cargo is being moved to a non-CONASA-ILA Port in the normal course of business, and not for the purpose of evasion, then such movement is not in violation.

Rule 6—Importers Advertising Evasion of Rules

The circulation, in writing, by importers, of methods developed by them to evade the Rules on Containers by issuing single bills of lading on what are in fact consolidated container loads shall be deemed a violation and all CONASA-ILA Container Committees shall be advised to stop such evasion at the waterfront facilities.

Rule 7—No Avoidance or Evasion

The above rules are intended to be fairly and reasonably applied by the parties. To obtain non-discriminatory and fair implementation of the above, the following principles shall apply:

(a) Geographic Area—Agreement in the port to the geograpric area as provided in Rule 1 is based on present consolidated movement patterns in the port. Should any person, firm or corporation for the purpose of evading the provisions of the Rules on Containers, seek to change such pattern by shifting its operations to, or commencing new operations at, a point outside said agreed upon geographic area, then either party may raise the question whether said point should be included within the said geographic area, and upon agreement that the purpose of the shift in its operations was to evade the provisions of the Rules on Containers, then said point shall be deemed to be within the said geographic area for the purpose of these rules.

(b) Containers Owned, Leased or Used—Containers owned, leased or used by companies which are affiliated either directly or through a holding company with a carrier or a direct employer shall be deemed to be containers owned, leased or used by a carrier or direct employer. Affiliation shall include subsidiaries and/or affiliates which are effectively controlled by the carrier or direct employer, its parent, or stockholders of either of them.

(c) Liquidated Damages—Failure to load or discharge a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provi-

sions of Rule 1 and Rule 2 shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been loaded or discharged under the rules, then the carrier or its agent or direct employer shall pay, to the joint Container Royalty Fund, liquidated damages of $1,000 per container which should have been loaded or discharged. If any carrier does not pay liquidated damages within 30 days after exhausting its right to appeal the imposition of liquidated damages to the Committee provided in Rule 9(a) below, the ILA shall have the right to stop working such carrier's containers until such damages are paid.

(d) Any facility operated in violation of the Container Rules will not have service supplied to it by any direct employer and the ILA will not supply labor to such facility.

Rule 8—Renegotiation and Cancellation—No Arbitration

These Rules shall be in effect for the term of the CONASA-ILA Agreement, provided, however, that either party shall have the right to cancel the Rules on Containers at any time on or after December 1, 1974, on thirty (30) days' written notice of a desire to renegotiate the provisions of these Rules. Negotiations shall be held during such thirty (30) day period and if the parties are unable to agree by the end of such period, these Rules shall be deemed cancelled. Thereafter, the ILA shall have the right to refuse to handle containers and CONASA shall have the right to refuse to hire employees under the said Rules. The negotiations referred to above shall, under no condition, be subject to the grievance or arbitration provisions of any CONASA-ILA Agreement.

Rule 9—Enforcement of the Rules on Containers

To assure effective, fair and non-discriminatory enforcement of the above Rules, the following regulations shall apply:

(a) A Committee in each CONASA port represented equally by management and union shall be formed and shall have the responsibility and power to hear and pass judgment on any violations of these Rules. Any inability to agree shall be processed as a grievance under the applicable contract except as limited by Rule 8 hereof. A joint committee, known as the CONASA-ILA Container Committee, represented equally by management and labor and made up of representatives (to be mutually agreed upon) from each CONASA port, namely, Boston, Rhode Island, New York, Philadelphia, Baltimore and Hampton Roads shall meet at least quarterly each year for the purpose of insuring uniformity in the interpretation of these Rules.

(b) A Committee of carriers, together with CONASA-ILA Container Committee will develop uniform documentation which shall be required to be prepared and maintained by all carriers in order to readily identify all Rule 1 containers which are subject to loading or discharging by deep-sea ILA labor. It shall be the obligation of employer-members to clearly mark each container's documentation as to whether or not it is a Rule 1 container, which shall be loaded or discharged. If a container's documentation is not clearly marked, it shall be deemed a Rule 1 container and it shall be loaded or discharged by deep-sea ILA labor at the waterfront facility. With respect to all containers received at or delivered from the waterfront facility, a record of the

same shall be made by ILA Checkers and Clerks. All carriers will distribute to all other carriers any and all information and devices which are being used by any person to circumvent the Rules on Containers. Any carrier whose attention is brought to a violation of the Rules shall immediately cease such violation and report the matter to the appropriate CONASA-ILA Container Committee and to the policing agency provided in (e) below in its port.

APPENDIX A(vi)

CONASA-ILA RULES ON CONTAINERS—1975

* * * *

Rule 2—Containers Not to be Loaded or Discharged by ILA Labor

Cargo in containers referred to below shall not be loaded or discharged by ILA labor:

A. Export Cargo:

* * * *

(3) Containers loaded with the cargo of a single manufacturer (manufacturer's label) [at its facilities with its own employees.]

* * * *

[(5) There shall be no general warehouse exception applicable to export cargo.]

B. Import Cargo:

* * * *

(4) Containers of a qualified consignee discharged at a bona fide public warehouse within the "geograpric area" which comply with all of the following conditions:

1. The container cargo is warehoused at a bona fide public warehouse;
2. The qualified consignee pays the normal labor charges in and out; and the normal warehouse storage fees for a minimum period of thirty or more days; [and stores the cargo for a minimum period of 30 days;] and
3. The cargo being warehoused (a) in the normal course of the business of the qualified consignee; (b) title to such goods has not been transferred from the qualified consignee to another.

The carrier on request will furnish all documentation and other information which permits the Container Committee in the port to determine whether conditions 1, 2 and 3 have been met. This exception shall not apply where cargo is warehoused for the purpose of avoidance or evasion of Rule 1. It is limited to containers warehoused as provided in the above conditions and any warehouse which does not conform to such conditions shall be deemed a consolidator or de-consolidator.

[(Clarification: In keeping with prior CONASA-ILA decisions trucking stations where containers are unloaded within the geographic area do not constitute bona fide public warehouses even where cargo is destined for delivery outside the geographic area).]

* * * *

Rule 9—Enforcement of the Rules on Containers

* * * *

[(f) Council of Container Carriers—There shall be organized promptly a Council of Container Carriers composed of representatives of every major container carrier who, subject to the direction of CONASA, shall meet with the ILA at all regular and special meetings of the CONASA-ILA Container meetings, and who shall participate in the discussion and resolution of problems and interpretations of the Container Rules discussed at the said meetings.]

[(g) Powers of CONASA-ILA Container Committee—In order to permit the fair and nondiscriminatory application of the Rules and to encourage the movement of cargo in all CONASA-ILA ports, the CONASA-ILA Container Committee is hereby empowered to make such amendments or modifications to these

Rules as may be necessary to the equitable application of the principles of these Rules to particlular cases.]

Rule 10—Container Royalty Payments

The two Container Royalty payments required by the CONASA-ILA collective bargaining agreements shall be payable only once in the continental United States. They shall be paid in that ILA port where the container is first handled by ILA longshore labor at longshore rates. The second container royalty payment (provided by paragraph 6 of the 1971-1974 CONASA-ILA Memorandum of Agreement) shall be continued and shall be used for fringe benefit purposes only, other than supplemental cash benefits, which purposes are to be determined locally on a port by port basis. Containers originating at a foreign port which are transshipped at a United States port for ultimate destination to another foreign port ("foreign sea-to-foreign-sea containers") are exempt from the payment of container royalties. [Container royalty payments shall be assessed against all containers moving across the continental United States by rail or truck under the foreign-to-foreign "LAND-BRIDGE" system. The said royalty payments shall become due for all such containers moving through CONASA-ILA ports on and after July 1, 1975.]

[Rule 11—Execution of Agreement

All carriers utilizing ILA labor in handling containers in any of the CONASA ports shall be bound by the CONASA-ILA Rules on Containers, and shall be required to execute the agreement between CONASA and ILA containing the said Rules on Containers. No contracting stevedore shall perform services for any carrier, private or governmental, unless such carrier has subscribed to this agreement as aforesaid.]

APPENDIX A(vii)

CONASA-ILA AGREEMENT—1977

RULES ON CONTAINERS

* * * *

Rule 8—RENEGOTIATION AND CANCELLATION—NO ARBITRATION

[If any article, section, paragraph, clause or phrase of this Agreement shall, by any State, Federal or other law, or by any decision of any Court or Administrative Agency, be declared or held illegal, void or unenforceable, the entire Agreement shall terminate upon sixty (60) day's written notice to the other party hereto and the parties agree to enter into negotiations in an attempt to renegotiate that provision of the Agreement which was nullified. If no agreement is reached within the sixty (60) day notice period, the ILA shall have the right to strike and CONASA shall have the right to refuse to hire employees under this Agreement. The negotiations referred to above shall, under no conditions, be subject to the grievance or arbitration provisions of this agreement, or of any Local Agreement.]

* * * *

Rule 10—CONTAINER ROYALTY PAYMENTS

The two Container Royalty payments, I & II required by the NYSA and CONASA-ILA collective bargaining agreements shall be payable only once in the continental United States. They shall be paid in that ILA port where the container is first handled by ILA longshore labor at longshore rates. The second container royalty payment (provided by paragraph 6 of the 1971-1974 NYSA and CONASA-ILA Memorandum of Agreement) shall be continued and shall be used for fringe benefit purposes only, other than supplemental cash benefits, which purposes are to be determined locally on a port by

port basis. Containers originating at a foreign port which are transshipped at a United States port for ultimate destination to another foreign port ("foreign sea-to-foreign-sea containers") are exempt from the payment of container royalties. Container royalty payments shall be assessed against all containers moving across the continental United States by rail or truck under the foreign-to-foreign "LAND-BRIDGE" system. The said royalty payments shall become due for all such containers moving through NYSA and CONASA-ILA ports on and after July 1, 1975.

[An additional container royalty equal to the present container royalty of 35 cents, 70 cents and $1.00 per gross ton payable as provided in the November 16, 1960 Stein Award to be used for fringe benefit purposes only, other than supplemental cash benefits, which purposes are to be determined locally on a port basis.

As provided in the May 12, 1977 Addendum between CONASA and ILA, effective May 1, 1977 the First Container Royalty Payment (provided for in Paragraph "6" of the 1971-77 CONASA-ILA Memorandum of Agreement) shall be doubled. Such additional container royalty payment shall be used exclusively for supplemental cash payments to employees covered by the CONASA-ILA Agrements, and for no other purpose.

The second Container Royalty shall be used as determined by the employers.

CONASA and the Carriers that the payment of container royalties as provided in their agreements is of the essence to this agreement and, if for any reason during the term of this agreement such payments cannot be made in their present form, then CONASA and the Carriers shall provide, by some other form of assessment, for the payment of equivalent amounts to be used for the same purposes as said container royalties are presently used.]

APPENDIX A(viii)

MANAGEMENT-ILA RULES ON CONTAINERS—1980

* * * *

Rule 6—IMPORTERS ADVERTISING EVASION OF RULES

The circulation, in writing, by importers, of methods developed by them to evade the Rules on Containers by issuing single bills of lading on what are in fact consolidated container loads shall be deemed a violation and all Management-ILA Container Committees, [including the Port Committees,] shall be advised to stop such evasion at the waterfront facilities.

* * * *

Rule 8—RENEGOTIATION AND CANCELLATION—NO ARBITRATION

If any article, section, paragraph, clause or phrase of this Agreement shall, by any State, Federal or other law, or by any decision of any Court or Administrative Agency, be declared or held illegal, void or unenforceable, the entire Agreement shall terminate upon sixty (60) day's written notice to the other party hereto and the parties agree to enter into negotiations in an attempt to renegotiate that provision of the Agreement which was nullified. [The said notice shall not be given prior to December 1, 1980.] If no agreement is reached within the sixty (60) day notice period, the ILA shall have the right to strike and Management shall have the right to refuse to hire employees under this Agreement. The negotiations referred to above shall, under no condition, be subject to grievance or arbitration under this Agreement or under any local Agreement.

* * * *

Rule 10—CONTAINER ROYALTY PAYMENTS

The two Container Royalty payments [effective in 1960 and 1977 respectively, shall be continued and shall be used exclusively for supplemental cash payments to employees covered by the Management agreements, and for no other purpose. The remaining royalty payment effective in 1971, also shall be continued and shall be used for fringe benefit purposes only, other than supplemental cash benefits, which purposes are to be determined locally on a port-by-port basis.] The Container Royalty payments shall be payable only once in the continental United States. They shall be paid in that ILA port where the container is first handled by ILA longshore labor, at longshore rates. Containers originating at a foreign port which are transshipped at a United States Port for ultimate destination to another foreign port ("foreign-sea-to-foreign-sea containers") are exempt from the payment of container royalties. Container Royalty payments shall be assessed against all containers moving across the continental United States by rail or truck in the foreign-to-foreign "LAND-BRIDGE" system.

Management and the Carriers agree that the payment of Container Royalties as provided in their agreements is of the essence of this agreement and, if for any reason during the term of this agreement such payments cannot be made in their present form, then Management and the Carriers shall provide by some other form of assessment for the payment of equivalent amounts to be used for the same purposes as said Container Royalties are presently used.

APPENDIX A(ix)

AGREEMENT BETWEEN MANAGEMENT AND ILA

1. Parties agree that the Rules on Containers will be placed in effect on January 1, 1981 in all ports from Maine to Texas, except in Philadelphia where an application for reconsideration will be made promptly.

2. In the event an injunction is issued in any port where the Rules have been placed in effect, or the Petition for Reconsideration in Philadelphia is denied, the ILA shall have the right to give the 60 day notice provided in paragraph 8 of the Containerization Agreement.

3. Any carrier who diverts cargo from one port to another to avoid the Rules shall, in addition to any other penalties, pay liquidated damages of $500 per container to the Pension Fund and $500 per container to the Welfare Fund.

4. The parties agree that counsel shall prepare an agreement whose purpose shall be to encourage the stuffing and stripping of containers at on-pier facilities by reducing pier costs and improving productivity with the cost of such program to be borne by containerized automated cargo which would have been stuffed or stripped on pier if the Rules were in effect. Such program is to be an amendment to JSP, is to be submitted within 30 days of this date and is to be in operation only in the event the Rules are unenforceable.

[SEAL] [SEAL]

APPENDIX B

NOTICE TO MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

AFTER A HEARING IN WHICH ALL SIDES HAD THE OPPORTUNITY TO PRESENT THEIR EVIDENCE, IT HAS BEEN FOUND THAT WE VIOLATED THE LAW. ACCORDINGLY, WE POST THIS NOTICE AND WE WILL KEEP THE PROMISES WE MAKE IN THIS NOTICE.

WE WILL NOT give effect to, invoke, or in any other manner or by any other means enforce the contract and agreements known as the CONASA-ILA rules on containers, rules 1(a)(3) and 2B(2) as set forth in the HRSA-ILA collective-bargaining agreement or any other arrangement express or implied whereby the Council of North Atlantic Shipping Associations, and the Hampton Roads Shipping Association, on behalf of its employer-members, agree to cease or refrain from doing business with surface motor carriers to the extent that they engage in "short stopping" or the stripping of "shippers load" containers, for their exclusive benefit and pursuant to the traditional offshore practice of motor carriers, which is not rivaled by services rendered at the pier by marine operators and not performed traditionally by deepsea ILA labor.

WE WILL NOT seek or impose fines against employer-members of the Hampton Roads Shipping Association, including United States Lines, Inc., or any other person engaged in commerce or in an industry

affecting commerce, where an object thereof is to force or require such persons to cease doing business with Associated Transport, Inc., Houff Transfer, Inc., Pilot Freight Carriers, Inc., Thurston Motor Lines, Inc., or any other member of the Tidewater Motor Truck Association, provided that the terms hereof shall only apply with respect to the practice of said motor carriers whereby import containers are stripped for their exclusive benefit as an incident of traditional motor carrier practice neither created by containerization, nor rivaled by services rendered by marine operators or work performed at the piers by deepsea ILA labor.

WE WILL NOT coerce, or restrain the Council of North Atlantic Shipping Associations, Hampton Roads Shipping Association, or any of Hampton Roads Shipping Association's employer-members, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require such person to cease doing business with Associated Transport, Inc., Pilot Freight Carriers, Inc., Thurston Motor Lines, Inc., and any other employer-member of Tidewater Motor Truck Association, to the extent that they are engaged in the above-defined practice.

WE WILL and do hereby notify our members, and other individuals employed by Hampton Roads Shipping Association, or any of its employer-members, that the CONASA-ILA rules on containers which have been negotiated between ILA and CONASA on behalf of Hampton Roads Shipping Association, shall not be applied to restrain, restrict, limit, fine or prohibit handling containers bearing shippers' loads, to the extent handled within the limits of the above practice.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCALS 333, 846, 862, 921, 953 970, 1248, 1355, 1429, 1458, 1624, 1736, 1783, 1784, 1819, 1840 & 1970

_____

(Labor Organizations)

Dated _____

By _____

(Representative) (Title)

HAMPTON ROADS DISTRICT COUNCIL, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

_____

(Labor Organization)

Dated _____

By _____

(Representative) (Title)

ATLANTIC COAST DISTRICT COUNCIL, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

_____

(Labor Organization)

Dated _____

By _____

(Representative) (Title)

This Is An Official Notice And
Must Not Be Defaced By Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 9100 Edward A. Garmatz Fed. Bldg. & Court House, 101 W. Lombard Street, Baltimore, Maryland 21201 (Tel. No. (301) 962-2915).

JD-515-81

[SEAL] [SEAL]

APPENDIX C

NOTICE

TO ALL EMPLOYEES AND EMPLOYER-MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

AFTER A HEARING IN WHICH ALL SIDES HAD THE OPPORTUNITY TO PRESENT THEIR EVIDENCE, IT HAS BEEN FOUND THAT WE VIOLATED THE LAW BY COMMITTING UNFAIR LABOR PRACTICES. ACCORDINGLY, WE POST THIS NOTICE AND WE SHALL KEEP THE PROMISES WE MAKE IN THIS NOTICE.

WE WILL NOT give effect to, invoke or in any manner or by any means enforce the contracts and agreements known as the CONASA-ILA rules on containers, rules 1(a)(3) and 2B(2), as set forth in the HRSA-ILA collective-bargaining agreement, or any other contract or agreement, express or implied, whereby CONASA, on behalf of HRSA, or HRSA on behalf of employer-members, agrees to cease or refrain from doing business with any other person in violation of Section 8(e) of the Act, to the extent found unlawful in the Decision of the Administrative Law Judge.

WE WILL and do hereby notify United States Lines, Inc., and all other employer-members of HRSA that the provisions of the CONASA-ILA rules on containers which have been negotiated between ILA and CONASA on behalf of Hampton Roads Shipping Association, shall not be enforced to restrain, restrict, limit, fine, or prohibit handling of containers, with respect to Associated Tranport, Inc., Pilot Freight Carriers, Inc., Thurston Motor Lines, Inc.,

and any other employer-member of Tidewater Motor Truck Association, to the extent that said containers are stripped solely for the exclusive benefit of motor carriers, pursuant to their traditional practice which is not rivaled by services traditionally rendered by marine operators and work performed by deepsea ILA labor.

HAMPTON ROADS SHIPPING ASSOCIATION

_____

(Labor Organization)

Dated _____

By _____

(Representative) (Title)

_____

This Is An Official Notice And
Must Not Be Defaced By Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 9100 Edward A. Garmatz Federal Building & Court House—101 W. Lombard Street, Baltimore, Maryland 21201—Telephone No. (301) 962-2915.

[SEAL] [SEAL]

APPENDIX D

NOTICE

TO ALL EMPLOYEES AND ASSOCIATION-MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

AFTER A HEARING IN WHICH ALL SIDES HAD THE OPPORTUNITY TO PRESENT THEIR EVIDENCE, IT HAS BEEN FOUND THAT WE VIOLATED THE LAW BY COMMITTING UNFAIR LABOR PRACTICES. ACCORDINGLY, WE POST THIS NOTICE AND WE SHALL KEEP THE PROMISES WE MAKE IN THIS NOTICE.

WE WILL NOT give effect to, invoke, or in any manner or by any means enforce the contracts and agreements known as the CONASA-ILA rules on containers, rules 1(a)(3) and 2B(2), as set forth in the HRSA-ILA collective-bargaining agreement, or any other contract or agreement, express or implied, whereby CONASA, on behalf of HRSA, or HRSA on behalf of its employer-members, agrees to cease or refrain from doing business with any other person in violation of Section 8(e) of the Act, as found unlawful in the Decision of the Administrative Law Judge.

WE WILL and do hereby notify United States Lines, Inc., and all other employer-members of HRSA that the provisions of the contracts and agreements known as the CONASA-ILA rules on containers ~~which~~ have been negotiated between ILA and CONASA on behalf of Hampton Roads Shipping Association, shall not be enforced to restrain, restrict, limit, fine, or prohibit handling of containers with

respect to Associated Transport, Inc., to the extent that said containers are stripped solely for the exclusive benefit of motor carriers, pursuant to traditional motor carrier practice, which is not rivaled by services traditionally rendered by marine operators and work performed by deepsea ILA labor.

COUNCIL OF NORTH ATLANTIC
SHIPPING ASSOCIATION

_____

(Labor Organization)

Dated _____

By _____

(Representative) (Title)

This Is An Official Notice And
Must Not Be Defaced By Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 9100 Edward A. Garmatz Fed. Bldg. & Court House—101 W. Lombard Street, Baltimore, Maryland 21201 (Tel. No. (301) 962-2915).

[SEAL] [SEAL]

APPENDIX E

NOTICE TO MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT induce or encourage employees of Chesapeake Operating Company, or any other person subject to the National Labor Relations Act to engage in a strike, or refusal, in the course of their employment, to do work or perform services, or threaten, coerce, or restrain Chesapeake Operating Company or any other person subject to the National Labor Relations Act,

—where, in either case, an object thereof is to force or require any company or person to stop doing business with Shipside Packing Company, or to stop handling, loading, unloading or dealing with goods packed by Shipside, to the extent found unlawful in the attached Decision of the Administrative Law Judge.

WE HEREBY cancel and withdraw any orders or instructions given our members or any other individuals not to load, unload, or handle containers packed by Shipside Packing Company, to the extent that said containers are handled in conjunction with traditional general warehousing practices on behalf of a single shipper on a continuous basis whereby large quantities of cargo are regularly accumulated, stored, picked and packed for FSL export shipment.

WE HEREBY notify our members, and any other employees or individuals, that we have no objection to our members or any other employees loading or unloading, or handling cargo stuffed by Shipside Packing Company under the aforedescribed conditions.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO;
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, DISTRICT COUNCIL, BALTIMORE, MARYLAND;
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 953 and
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 333

(Labor Organization)

Dated _____

By _____
(Representative) (Title)

This Is An Official Notice And
Must Not Be Defaced By Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 9100 Edward A. Garmatz Federal Building & Court House, 101 W. Lombard Street—Baltimore, Maryland 21201—Telephone No. (301) 962-2915.

[SEAL] [SEAL]

APPENDIX F

NOTICE TO MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT: (1) Induce or encourage employees of Chesapeake Operating Company, Ceres Terminals, Inc., or any other persons, to engage in a strike, or refusal to work or to perform employment services, or (2) threaten, coerce, or restrain Chesapeake Operating Company, Ceres Terminals, Inc., or any other person, in order to force or require any company or person to stop doing business with The Terminal Corporation, or to stop handling, loading, unloading, or dealing with containers to be stripped by The Terminal Corporation, in conjunction with traditional general warehousing functions of indefinite storage *and* deferred, partial distribution pursuant to a continuing relationship with an exporter or consignee.

WE HEREBY cancel and withdraw any orders or instructions given to our members or any other individuals not to unload, or handle containers to be stripped by The Terminal Corporation, under the above-stated conditions.

WE HEREBY notify our members, and any other employees or individuals that we have no objection to our members or any other employees unloading, or handling containers to be stripped by The Terminal Corporation under the above-stated conditions.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

(Labor Organization)

Dated _____

By _____

(Representative) (Title)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ATLANTIC COAST DISTRICT, AFL-CIO

(Labor Organization)

Dated _____

By _____

(Representative) (Title)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 333, AFL-CIO

(Labor Organization)

Dated _____

By _____

(Representative) (Title)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 953, AFL-CIO

(Labor Organization)

Dated _____

By _____

(Representative) (Title)

This Is An Official Notice And
Must Not Be Defaced By Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 9100 Edward A. Garmatz Federal Building & Court House, 101 W. Lombard Street—Baltimore, Maryland 21201—Telephone No. (301) 962-2915.

JD-515-81

[SEAL] [SEAL]

APPENDIX G

NOTICE TO MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT participate in or give effect to any agreement, arrangement or plan, express or implied whereby members of Southeast Florida Port Association are to cease using, handling, transporting, or otherwise dealing in the products of any other processor, or to cease doing business with members of Custom Brokers and Forwarders Association of Miami, Inc., or any other person, to the extent that such an agreement arrangement or plan is invoked as an aid to organizing employees and encouraging their membership in the International Longshoremen's Association, or its affiliates.

WE WILL notify our members who are employed by employer-members of Southeast Florida Employers Port Association that WE WILL NOT participate in, or in any manner enforce an arrangement whereby access to maritime containers will be afforded or denied to members of Custom Brokers and Forwarders Association of Miami, Inc., or any other person engaged in work off the piers, on the basis of whether they do, or do not, employ members of the International Longshoremen's Association or its affiliates.

INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, AFL-CIO,
LOCAL 1416

_____
(Labor Organization)

Dated _____

By _____
(Representative) (Title)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1416-A

_____

(Labor Organization)

Dated _____

By _____

(Representative) (Title)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1680

_____

(Labor Organization)

Dated _____

By _____

(Representative) (Title)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 1526

_____

(Labor Organization)

Dated _____

By _____

(Representative) (Title)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 1526-A

_____

(Labor Organization)

Dated _____

By _____

(Representative) (Title)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1922

(Labor Organization)

Dated _____

By _____
(Representative) (Title)

This Is An Official Notice And
Must Not Be Defaced By Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Robert I. Timberlake, Jr.—Federal Office Building—Rm. 706, 500 Zack Street—P.O. Box 3322, Tampa, Florida—Telephone No. (813) 228-2662.

JD-515-81

[SEAL] [SEAL]

APPENDIX H

NOTICE

TO ALL EMPLOYEES AND EMPLOYER-MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT participate in or give effect to any agreement arrangement, or plan, express or implied, whereby employer-members of Southeast Florida Employees Port Association are to cease handling, transporting, or otherwise dealing in the products of any other processor, or to cease doing business with members of Custom Brokers and Forwarders Association of Miami, Inc., or any other person, to the extent that such an agreement arrangement or plan is invoked as an aid to organizing employees and encouraging their membership in the International Longshoremen's Association, or its affiliates.

WE WILL notify all our members and employees that we will not seek, participate in, or enforce any arrangement agreement or plan, express or implied, whereby access to maritime containers is afforded or denied to members of Custom Brokers and Forwarders Association of Miami, Inc., or any other person engaged in work off the piers, on the basis of whether they do, or do not, employ members of the International Longshoremen's Association, or its affiliates.

SOUTHEAST FLORIDA EMPLOYEES
PORT ASSOCIATION

_____

(Labor Organization)

Dated _____

By _____

(Representative) (Title)

CHESTER, BLACKBURN & RODER, INC.

_____

(Labor Organization)

Dated _____

By _____

(Representative) (Title)

COORDINATED CARIBEAN TRANSPORT, INC.

_____

(Labor Organization)

Dated _____

By _____

(Representative) (Title)

EAGLE, INC.

_____

(Labor Organization)

Dated _____

By _____

(Representative) (Title)

ELLER & COMPANY, INC.

_____

(Labor Organization)

Dated _____

By _____

(Representative) (Title)

HARRINGTON & COMPANY, INC.

(Labor Organization)

Dated _____

By _____
(Representative) (Title)

STRACHER SHIPPING COMPANY

(Labor Organization)

Dated _____

By _____
(Representative) (Title)

MARINE TERMINALS, INC.

(Labor Organization)

Dated _____

By _____
(Representative) (Title)

This Is An Official Notice And
Must Not Be Defaced By Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Robert I. Timberlake, Jr.—Federal Office Building—Rm. 706—500 Zack Street—P.O. Box 3322, Tampa, Florida—Telephone No. (813) 228-2662.

APPENDIX E

RELATED MARITIME STATUTES INVOLVED

Interstate Commerce Act, 49 U.S.C. § 2

§ 2. Special rates and rebates probibited

If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful. (Repealed in part by Pub. L. 95-473, § 4(b), (c), Oct. 17, 1978, 92 Stmt. 1466-1470).

Maritime Labor Agreement Act of 1980, 46 U.S.C. § 801 et seq.

§ 801. Definitions

When used in this chapter:

The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided*, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "controlled carrier" means a common carrier by water operating, offering, or proposing to offer service in the foreign commerce of the United States which carrier is or whose operating assets are directly or indirectly owned or controlled by the government under whose registry the vessels of the controlled carrier operate. Ownership or control by such government shall be deemed to exist if a majority portion of the interest in the carrier is owned or controlled in any manner by such government, by any agency of the government, or by any person, corporation, or entity controlled by such government. Ownership or control shall also be deemed to exist if the government has the right to appoint or disapprove the appointment of a majority of the directors or the chief operating or executive officer of the carrier.

The term "other person subject to this chapter" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country.

The term "vessel" includes all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or are intended to be used as a means of transportation on water.

The term "documented under the laws of the United States," means "registered, enrolled, or licensed under the laws of the United States."

The term "carrying on the business of forwarding" means the dispatching of shipments by any person on behalf of others, by ocean-going common carriers in commerce from the United States, its Territories, or possessions to foreign countries, or between the United States and its Territories or possessions, or between such Territories and possessions, and handling the formalities incident to such shipments.

The term "independent ocean freight forwarder" means a person that is carrying on the business of forwarding for a consideration who is not a shipper, consignee, seller, or purchaser of shipments to foreign countries.

The term "maritime labor agreement" means any collective bargaining agreement between an employer subject to this chapter, or group of such employers and a labor organization representing employees in the maritime or stevedoring industry, or any agreement preparatory to such a collective bargaining agreement among members of a multiemployer bargaining group, or any agreement specifically implementing provisions of such a collective bargaining agreement or providing for the formation, financing, or administration of a multiemployer bargaining group.

* * *

§ 841c. Exemption for maritime labor agreements; exception; tariff requirements not exempt

The provisions of this chapter and of the Intercoastal Shipping Act, 1933 [46 U.S.C.A. § 843 et seq.], shall not

apply to maritime labor agreements and all provisions of such agreements except to the extent that such provisions provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized. Notwithstanding the preceding sentence, nothing in this section shall be construed as providing an exemption from the provisions of this chapter or of the Intercoastal Shipping Act, 1933, for any rates, charges, regulations, or practices of a common carrier by water or other person subject to this chapter which are required to be set forth in a tariff, whether or not such rates, charges, regulations, or practices arise out of, or are otherwise related to a maritime labor agreement.

Sections 14 Fourth and 16 First of the Shipping Act, 1916, 46 U.S.C. §§ 812 and 814

§ 812. Rebates and discriminations by carriers by water prohibited; use of "fighting ship"

No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port or a State, Territory, District, or possession of the United States and any other such port or port of a foreign country—

First. Pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper. The term "deferred rebate" in this chapter means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this chapter means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense. *Provided*, That nothing in this section or elsewhere in this chapter, shall be construed or applied to forbid or make unlawful any dual rate contract arrangement in use by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under section 814 of this title by the regulatory body administering this chapter, unless and until such regulatory body disapproves, cancels, or modifies such arrangement in accordance with the standards set forth in section 814 of this title. The term "dual rate contract arrangement" as used herein means a practice whereby a conference establishes tariffs of rates at two levels the lower of which

will be charged to merchants who agree to ship their cargoes on vessels of members of the conference only and the higher of which shall be charged to merchants who do not so agree.

§ 814. Contracts between carriers filed with Commission; definition of "agreement"; approval, disapproval, etc., by Commission; unlawful execution of agreements; conference agreements and antitrust laws exemptions; civil action for penalties; terminal leases exemption

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements, but does not include maritime labor agreements or any provisions of such agreements, unless such provisions provide for an assessment agreement described in the fifth paragraph of this section.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly dis-

criminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership or other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellation shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations

explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to non-contract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Assessment agreements, whether part of a collective bargaining agreement or negotiated separately, to the extent they provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized, shall be deemed approved upon filing with the Commission. The Commission shall thereafter, upon complaint filed within 2 years of the date of filing of the agreement, disapprove, cancel, or modify any such agreement, or charge or assessment pursuant thereto, that it finds, after notice and hearing, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, or to operate to the detriment of the commerce of the United States. The Commission shall issue its final decision in any such complaint proceeding within 1 year of the date of filing of the complaint. To the extent that any assessment or charge is found, in such a complaint proceeding, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, the Commission shall remedy the unjust discrimination or unfairness for the period of time between the filing of the complaint and the final decision by means of assessment adjustments. Such adjustments shall be implemented by prospective credits or debits to future assessments or charges, except in the case of a complainant, who has ceased activities subject to the assessment or charge, in

which case reparation may be awarded. To the extent that any provision of this paragraph conflicts with the language of section 821 of this title or any other section of this chapter, or of the Intercoastal Shipping Act, 1933 [46 U.S.C.A. § 843 et seq.], the provisions of this paragraph shall control in any matter involving assessment agreements described herein.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1 to 11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be subject to a civil penalty of not more than $1,000 for each day such violation continues: *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or cancelled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section.

46 C.F.R. § 510.2(1)

(1) "Nonvessel operating common carrier by water" is a common carrier by water as defined in section 1 of the Act, which does not operate the vessels by which its ocean transportation is provided but which holds itself out, by the establishment and maintenance of tariffs, by advertisement, solicitation, or otherwise, to provide trans-

portation of property for hire by water in commerce from the United States; which assumes responsibility or has liability imposed by law for the safe transportation of such property; and which arranges in its own name for the performance of such transportation by underlying water carriers.

PUBLIC LAW 98-237—MAR. 20, 1984

Public Law 98-237
98th Congress

AN ACT

To improve the international ocean commerce transportation system of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Shipping Act of 1984".

SEC. 2. DECLARATION OF POLICY.

The purposes of this Act are—

(1) to establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs;

(2) to provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices; and

(3) to encourage the development of an economically sound and efficient United States-flag liner fleet capable of meeting national security needs.

SEC. 3. DEFINITIONS.

As used in this Act—

(1) "agreement" means an understanding, arrangement, or association (written or oral) and any

modification or cancellation thereof; but the term does not include a maritime labor agreement.

(2) "antitrust laws" means the Act of July 2, 1980 (ch. 647, 26 Stat. 209), as amended; the Act of October 15, 1914 (ch. 323, 38 Stat. 730), as amended; the Federal Trade Commission Act (38 Stat. 717), as amended; sections 73 and 74 of the Act of August 27, 1894 (28 Stat. 570), as amended; the Act of June 19, 1936 (ch. 592, 49 Stat. 1526), as amended; the Antitrust Civil Process Act (76 Stat. 548), as amended; and amendments and Acts supplementary thereto.

(3) "assessment agreement" means an agreement, whether part of a collective-bargaining agreement or negotiated separately, to the extent that it provides for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized.

(4) "bulk cargo" means cargo that is loaded and carried in bulk without mark or count.

(5) "Commission" means the Federal Maritime Commission.

(6) "common carrier" means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that—

(A) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and

(B) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

(7) "conference" means an association of ocean common carriers permitted, pursuant to an approved or effective agreement, to engage in concerted activity and to utilize a common tariff; but the term does not include a joint service, consortium, pooling, sailing, or transshipment arrangement.

(8) "controlled carrier" means an ocean common carrier that is, or whose operating assets are, directly or indirectly, owned or controlled by the government under whose registry the vessels of the carrier operate; ownership or control by a government shall be deemed to exist with respect to any carrier if—

(A) a majority portion of the interest in the carrier is owned or controlled in any manner by that government, by any agency thereof, or by any public or private person controlled by that government; or

(B) that government has the right to appoint or disapprove the appointment of a majority of the directors, the chief operating officer, or the chief executive officer of the carrier.

(9) "deferred rebate" means a return by a common carrier of any portion of the freight money to a shipper as a consideration for that shipper giving all, or any portion, of its shipments to that or any other common carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

(10) "fighting ship" means a vessel used in a particular trade by an ocean common carrier or group of such carriers for the purpose of excluding, pre-

venting, or reducing competition by driving another ocean common carrier out of that trade.

(11) "forest products" means forest products in an unfinished or semifinished state that require special handling moving in lot sizes too large for a container, including, but not limited to lumber in bundles, rough timber, ties, poles, piling, laminated beams, bundled siding, bundled plywood, bundled core stock or veneers, bundled particle or fiber boards, bundled hardwood, wood pulp in rolls, wood pulp in unitized bales, paper board in rolls, and paper in rolls.

(12) "inland division" means the amount paid by a common carrier to an inland carrier for the inland portion of through transportation offered to the public by the common carrier.

(13) "inland portion" means the charge to the public by a common carrier for the nonocean portion of through transportation.

(14) "loyalty contract" means a contract with an ocean common carrier or conference, other than a service contract or contract based upon time-volume rates, by which a shipper obtains lower rates by committing all or a fixed portion of its cargo to that carrier or conference.

(15) "marine terminal operator" means a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier.

(16) "maritime labor agreement" means a collective-bargaining agreement between an employer subject to this Act, or group of such employers, and a labor organization representing employees in the maritime or stevedoring industry, or an agreement preparatory to such a collective-bargaining agree-

ment among members of a multiemployer bargaining group, or an agreement specifically implementing provisions of such a collective-bargaining agreement or providing for the formation, financing, or administration of a multiemployer bargaining group; but the term does not include an assessment agreement.

(17) "non-vessel-operating common carrier" means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

(18) "ocean common carrier" means a vessel-operating common carrier; but the term does not include one engaged in ocean transportation by ferry boat or ocean tramp.

(19) "ocean freight forwarder" means a person in the United States that—

(A) dispatches shipments from the United States via common carriers and books or otherwise arranges space for those shipments on behalf of shippers; and

(B) processes the documentation or performs related activities incident to those shipments.

(20) "person" includes individuals, corporations, partnerships, and associations existing under or authorized by the laws of the United States or of a foreign country.

(21) "service contract" means a contract between a shipper and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level—such as, as-

sured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party.

(22) "shipment" means all of the cargo carried under the terms of a single bill of lading.

(23) "shipper" means an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

(24) "shippers' association" means a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts.

(25) "through rate" means the single amount charged by a common carrier in connection with through transportation.

(26) "through transportation" means continuous transportation between origin and destination for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is a common carrier, between a United States point or port and a foreign point or port.

(27) "United States" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, and all other United States territories and possessions.

SEC. 4. AGREEMENTS WITHIN SCOPE OF ACT.

(a) OCEAN COMMON CARRIERS.—This Act applies to agreements by or among ocean common carriers to—

(1) discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations, and other conditions of service;

(2) pool or apportion traffic, revenues, earnings, or losses;

(3) allot ports or restrict or otherwise regulate the number and character of sailings between ports;

(4) limit or regulate the volume or character of cargo or passenger traffic to be carried;

(5) engage in exclusive, preferential, or cooperative working arrangements among themselves or with one or more marine terminal operators or non-vessel-operating common carriers;

(6) control, regulate, or prevent competition in international ocean transportation; and

(7) regulate or prohibit their use of service contracts.

(b) MARINE TERMINAL OPERATORS.—This Act applies to agreements (to the extent the agreements involve ocean transportation in the foreign commerce of the United States) among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers to—

(1) discuss, fix, or regulate rates or other conditions of service; and

(2) engage in exclusive, preferential, or cooperative working arrangements.

(c) ACQUISITIONS.—This Act does not apply to an acquisition by any person, directly or indirectly, of any voting security or assets of any other person.

SEC. 5. AGREEMENTS.

(a) FILING REQUIREMENTS.—A true copy of every agreement entered into with respect to an activity de-

scribed in section 4 of this Act shall be filed with the Commission, except agreements related to transportation to be performed within or between foreign countries and agreements among common carriers to establish, operate, or maintain a marine terminal in the United States. In the case of an oral agreement, a complete memorandum specifying in detail the substance of the agreement shall be filed. The Commission may by regulation prescribe the form and manner in which an agreement shall be filed and the additional information and documents necessary to evaluate the agreement.

(b) CONFERENCE AGREEMENTS.—Each conference agreement must—

(1) state its purpose;

(2) provide reasonable and equal terms and conditions for admission and readmission to conference membership for any ocean common carrier willing to serve the particular trade or route;

(3) permit any member to withdraw from conference membership upon reasonable notice without penalty;

(4) at the request of any member, require an independent neutral body to police fully the obligations of the conference and its members;

(5) prohibit the conference from engaging in conduct prohibited by section 10(c)(1) or (3) of this Act;

(6) provide for a consultation process designed to promote—

(A) commercial resolution of disputes, and

(B) cooperation with shippers in preventing and eliminating malpractices;

(7) establish procedures for promptly and fairly considering shippers' requests and complaints; and

(8) provide that any member of the conference may take independent action on any rate or service item required to be filed in a tariff under section 8(a) of this Act upon not more than 10 calendar days' notice to the conference and that the conference will include the new rate or service item in its tariff for use by that member, effective no later than 10 calendar days after receipt of the notice, and by any other member that notifies the conference that it elects to adopt the independent rate or service item on or after its effective date, in lieu of the existing conference tariff provision for that rate or service item.

(c) INTERCONFERENCE AGREEMENTS.—Each agreement between carriers not members of the same conference must provide the right of independent action for each carrier. Each agreement between conferences must provide the right of independent action for each conference.

(d) ASSESSMENT AGREEMENTS.—Assessment agreements shall be filed with the Commission and become effective on filing. The Commission shall thereafter, upon complaint filed within 2 years of the date of the agreement, disapprove, cancel, or modify any such agreement, or charge or assessment pursuant thereto, that it finds, after notice and hearing, to be unjustly discriminatory or unfair as between carriers, shippers, or ports. The Commission shall issue its final decision in any such proceeding within 1 year of the date of filing of the complaint. To the extent that an assessment or charge is found in the proceeding to be unjustly discriminatory or unfair as between carriers, shippers, or ports, the Commission shall remedy the unjust discrimination or unfairness for the period of time between the filing of the complaint and the final decision by means of assessment adjustments. These adjustments shall be implemented by prospective credits or debits to future assessments or charges, except in the case of a complainant who has

ceased activities subject to the assessment or charge, in which case reparation may be awarded. Except for this subsection and section 7(a) of this Act, this Act, the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, do not apply to assessment agreements.

(e) MARITIME LABOR AGREEMENTS.—This Act, the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, do not apply to maritime labor agreements. This subsection does not exempt from this Act, the Shipping Act, 1916, or the Intercoastal Shipping Act, 1933, any rates, charges, regulations, or practices of a common carrier that are required to be set forth in a tariff, whether or not those rates, charges, regulations, or practices arise out of, or are otherwise related to, a maritime labor agreement.

SEC. 10. PROHIBITED ACTS.

(a) IN GENERAL.—No person may—

(1) knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable;

(2) operate under an agreement required to be filed under section 5 of this Act that has not become effective under section 6, or that has been rejected, disapproved, or cancelled; or

(3) operate under an agreement required to be filed under section 5 of this Act except in accordance with the terms of the agreement.

(b) COMMON CARRIERS.—No common carrier, either alone or in conjunction with any other person, directly or indirectly, may—

(1) charge, demand, collect, or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are shown in its tariffs or service contracts.

(2) rebate, refund, or remit in any manner, or by any device, any portion of its rates except in accordance with its tariffs or service contracts;

(3) extend or deny to any person any privilege, concession, equipment, or facility except in accordance with its tariffs or service contracts;

(4) allow any person to obtain transportation for property at less than the rates or charges established by the carrier in its tariff or service contract by means of false billing, false classification, false weighing, false measurement, or by any other unjust or unfair device or means;

(5) retaliate against any shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason;

(6) except for service contracts, engage in any unfair or unjustly discriminatory practice in the matter of—

(A) rates;

(B) cargo classifications;

(C) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage;

(D) the loading and landing of freight; or

(E) the adjustment and settlement of claims;

(7) employ any fighting ship;

(8) offer or pay any deferred rebates;

(9) use a loyalty contract, except in conformity with the antitrust laws;

(10) demand, charge, or collect any rate or charge that is unjustly discriminatory between shippers or ports;

(11) except for service contracts, make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever;

(12) subject any particular person, locality, or description of traffic to an unreasonable refusal to deal or any undue or unreasonable prejudice or disadvantage in any respect whatsoever;

(13) refuse to negotiate with a shippers' association; or

(14) knowingly disclose, offer, solicit, or receive any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to a common carrier without the consent of the shipper or consignee if that information—

(A) may be used to the detriment or prejudice of the shipper or consignee;

(B) may improperly disclose its business transaction to a competitor; or

(C) may be used to the detriment or prejudice of any common carrier.

Nothing in paragraph (14) shall be construed to prevent providing such information, in response to legal process, to the United States, or to an independent neutral body operating within the scope of its authority to fulfill the

policing obligations of the parties to an agreement effective under this Act. Nor shall it be prohibited for any ocean common carrier that is a party to a conference agreement approved under this Act, or any receiver, trustee, lessee, agent, or employee of that carrier, or any other person authorized by that carrier to receive information, to give information to the conference or any person, firm, corporation, or agency designated by the conference, or to prevent the conference or its designee from soliciting or receiving information for the purpose of determining whether a shipper or consignee has breached an agreement with the conference or its member lines or for the purpose of determining whether a member of the conference has breached the conference agreement, or for the purpose of compiling statistics of cargo movement, but the use of such information for any other purpose prohibited by this Act or any other Act is prohibited.

(c) CONCERTED ACTION.—No conference or group of two or more common carriers may—

(1) boycott or take any other concerted action resulting in an unreasonable refusal to deal;

(2) engage in conduct that unreasonably restricts the use of intermodal services or technological innovations;

(3) engage in any predatory practice designed to eliminate the participation, or deny the entry, in a particular trade of a common carrier not a member of the conference, a group of common carriers, an ocean tramp, or a bulk carrier;

(4) negotiate with a nonocean carrier or group of nonocean carriers (for example, truck, rail, or air operators) on any matter relating to rates or services provided to ocean common carriers within the United States by those nonocean carriers: *Provided*, That this paragraph does not prohibit the setting

and publishing of a joint through rate by a conference, joint venture, or an association of ocean common carriers;

(5) deny in the export foreign commerce of the United States compensation to an ocean freight forwarder or limit that compensation to less than a reasonable amount; or

(6) allocate shippers among specific carriers that are parties to the agreement or prohibit a carrier that is a party to the agreement from soliciting cargo from a particular shipper, except as otherwise required by the law of the United States or the importing or exporting country, or as agreed to by a shipper in a service contract.

* * * *

APPENDIX F

FEDERAL MARITIME COMMISSION

Docket No. 73-17

SEA-LAND SERVICE, INC. AND GULF PUERTO RICO LINES, INC.—PROPOSED RULES ON CONTAINERS

Docket No. 74-40

PUERTO RICO MARITIME SHIPPING AUTHORITY—PROPOSED ILA RULES ON CONTAINERS

REPORT AND ORDER ADOPTING INITIAL DECISION

Docket No. 73-17 was instituted on April 13, 1973 to determine whether the so-called "50-mile container rules" proposed by Sea-Land Service, Inc. (Sea-Land) and Gulf Puerto Rico Lines, Inc. (GPRL) in the U.S. East and Gulf Coast/Puerto Rico trade were violative of sections 14 Fourth, 16 First, and 18(a) of the Shipping Act, 1916 and section 4 of the Intercoastal Shipping Act of 1933.

Thereafter, Respondent Sea-Land proposed revisions to its tariff rules which it claimed would cure the infirmities which led to the investigation and suspension. However, by Commission Order of August 10, 1973, these revisions were likewise placed under investigation. This investigation proceeded under the August 10 Order until September, 1974.

During the period between April, 1973 and September, 1974, Sea-Land and GPRL withdrew from the Puerto Rican trade and the Puerto Rico Maritime Shipping Au-

thority (PRMSA) succeeded them as an ocean common carrier in that trade. On August 2, 1974, PRMSA filed its tariff which was to become effective on September 16, 1974, at or about which date PRMSA was to enter the U.S. East and Gulf Coast/Puerto Rico trade as an ocean common carrier. Certain portions of that tariff set forth identical provisions to those already under investigation. Therefore, by Order of September 13, 1974, the Commission placed PRMSA's proposed tariff rules under investigation; consolidated the new investigation (Docket No. 74-40) with the existent Docket No. 73-17; and ordered that the record already adduced in Docket No. 73-17 be used to the fullest extent possible to develop the issues in Docket No. 74-40.

Thereafter, on February 14, 1975, PRMSA filed amendments to its proposed tariff. By Order of March 14, 1975 the Commission ordered that these amendments be made a part of the ongoing investigation and that any future change, amendment or reissuance be so incorporated. This Order put in issue the rules of PRMSA as they stood at the time of hearing.

During the course of these proceedings, various participants either were named as parties or intervened. As the case came before us, the parties to the proceeding, in addition to PRMSA, were: Commonwealth of Puerto Rico (Commonwealth), Council of North Atlantic Shipping Associations (CONASA), International Association of NVOCC's (NVOCC's) National Customs Bureau and Forwarders Association of America, Inc. (National), New York Foreign Freight Forwarders & Brokers Association (NYFF), Consolidated Forwarders Intermodal Corp. (CONFICO), Puerto Rico Manufacturers Association, Truck Drivers Local Union Number 807 of the International Brotherhood of Teamsters, *et al.* (Teamsters Local 807), American Importers Association (AIA), Household Goods Freight Forwarders Association of America, Inc., and Commission Hearing Counsel.

After many months of hearings and the amassing of a voluminous record, Administrative Law Judge Charles E. Morgan issued his Initial Decision in which he found that the Commission had jurisdiction over the rules in issue and that such rules violated the sections of the Shipping Act as alleged.

Exceptions to the Initial Decision were filed by PRMSA and CONASA. Replies thereto were submitted by Hearing Counsel, by the NVOCC's, and by National, NYFF, and CONFICO.

Oral argument was heard and these proceedings came before us for decision. While our decision in these proceedings was pending, the validity of the collective bargaining rules which underlie the tariff rules was challenged before the NLRB. The collective bargaining provisions called Rules on Containers were found to be in violation of the National Labor Relations Act by the NLRB and the ILA and NYSA were ordered to cease their implementation and enforcement. That finding was upheld and the NLRB's order directed to be enforced by the Court of Appeals. The Supreme Court denied *certiorari*.[1]

As a result of the NLRB's decision, PRMSA filed a tariff note providing that its tariff rules on containers would not be enforced pending a determination of the validity of the underlying collective bargaining rules by the proper court of law.[2] In light of this tariff note provision and the holdings of the various courts, by Order issued August 10, 1977, we discontinued these

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[1] The NLRB decision was served December 9, 1975. It was upheld by the Court of Appeals at 537 F.2d 706 (1976) and denial of *certiorari* was ordered by the Supreme Court at 429 U.S. 1040 (1977). The Supreme Court also denied rehearing by Order of February 28, 1977 (51 L.Ed.2d 589).

[2] For a more thorough discussion of this tariff note, see our Order on Reconsideration issued this date.

cases on the ground that the allegedly unlawful rules on containers published by PRMSA had been "effectively withdrawn" by it.[3] Following issuance of our Order of Discontinuance, petitions for reconsideration were filed.[4] On the basis of these petitions, we granted reconsideration of the proceedings. Replies to the Petition for Reconsiderations were filed by Hearing Counsel and PRMSA.[5]

By Order on Reconsideration issued simultaneously with this Report and Order, we vacated our previous Order of Discontinuance and determined to issue a decision on the merits of the proceeding. As a result, we have, once more, reviewed the record of these cases and herewith serve our Report.

DISCUSSION

Many of the exceptions are merely reargument of positions taken before the Presiding Officer. Therefore some will not be discussed here. However, we have devoted a great deal of time and care to a thorough analysis and review of each exception in light of the record. If certain exceptions are not specifically discussed it is because, in each instance, we are of the opinion that the argument

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[3] These rules were, in fact, specifically cancelled by notice in PRMSA's tariff effective November 6, 1977.

[4] Petitioners were:

1. National Customs Brokers & Forwarders Association of America, Inc., New York Foreign Freight Forwarders & Brokers Association, Inc., and Consolidated Freight Forwarders Intermodal Corp. (filing a joint petition);
2. International Association of NVOCC's; and
3. Hearing Counsel.

[5] Pursuant to rules applicable to proceedings of this vintage, no replies to the petitions were permitted until the request for reconsideration was granted. See 46 C.F.R. Sections 502.261 and 502.262 as provided prior to May 19, 1976.

advanced was adequately analyzed and properly disposed of by the Presiding Officer.

In its exceptions, PRMSA merely adopted much of the argument propounded in brief by CONASA. In large part, these issues were adequately and properly treated by the Presiding Officer. However, we are of the opinion that one issue so raised deserves further discussion here.

In support of its position that its tariff rules should not have been found to be unlawful as alleged, PRMSA cites the holding of the Commission in the *South Atlantic and Caribbean Line* (SACL) case (12 F.M.C. 237 (1969)). We wish, once and for all, to put to rest any attempt to apply the holding of that case to the rules at issue here. That case presented only two issues. The first was one of fact: did the refusal to handle certain cargo constitute a true embargo in the sense that the carrier was "physically incapable of handling the traffic"? The second issue was one of law: did the SACL "Embargo Notice" comply with the filing and notice requirement of section 2 of the Intercoastal Shipping Act? There was no allegation of any violation of sections 14, 16 or 18 of the Shipping Act or of section 4 of the Intercoastal Act in that case.

In the present case, PRMSA claims that pursuant to the holding in the SACL case, since the tariff rules at issue here were properly filed under section 2 of the Intercoastal Act, they cannot be found to be unlawful as alleged. This is a clear non sequitur. We may readily agree that PRMSA filed its tariff rules properly in accord with section 2 of the Intercoastal Act and in consonance with the SACL case. However, the provisions of those rules, notwithstanding proper filing, can obviously, simultaneously, be unjust, unreasonable, and unduly and unreasonably prejudicial and disadvantageous.

The exceptions of CONASA constitute, almost entirely, a reargument of its position before the Presiding Officer. We are of the opinion that the Presiding Officer also properly disposed of those issues again with qualifications.

CONASA has raised as an issue on exception, the alleged error of the Presiding Officer with respect to his findings of violations of sections 14 Fourth and 16 First. CONASA objects to what it characterizes as a "per se violation" concept. CONASA's allegation is two-pronged.

First, CONASA claims that the Presiding Officer erred in concluding that the ocean transportation service rendered by PRMSA is the same whether a given container is loaded or unloaded at the pier or at an offpier facility. CONASA maintains that such a view ignores essential terminal services performed by ILA longshore labor as part and parcel of the total transportation service rendered by PRMSA.

Second, CONASA challenges the conclusion of the Presiding Officer that the dissimilarity of treatment of shippers under the rules as shown in the record constituted a violation of sections 14 and 16 of the Act. It argues that to constitute a violation of the Act, such dissimilar treatment must be undue or unjust—*i.e.*, unjustified by transportation factors. CONASA's position is, in essence, that the longshore services and the underlying collective bargaining agreement which regulates them are transportation factors which must be considered with regard to alleged violations of sections 14 and 16. Those services and the underlying agreement which created the disparate treatment of shippers, upon implementation by the tariff rules, constitute, in CONASA's view, a transportation factor which justifies the inequality which it creates. This is a novel, and, in our view, a circular proposition. CONASA would have us accept the proposi-

tion that the factors which created the uneven treatment also sufficiently justify such treatment. We find this argument ingenious but unconvincing.

We are of the opinion that the rules published in PRMSA's tariff were properly found by the Presiding Officer to create an anomalous condition where shippers who are similarly situated in all other transportation respects, are treated decidedly differently. Further, we agree with the Presiding Officer that the existence or not of a collective bargaining agreement which *affects* but is not *a part of* the transportation aspects of a shipper's relationship with his carrier, need not be given overwhelming priority or weight as a transportation factor by which to justify dissimilarity of treatment. We may agree that such an agreement is a factor to be considered. However, there are other such factors. The mere existence of the collective bargaining agreement does not pre-empt those other factors or foreclose our consideration of them. For us to adopt the contentions of respondents would be tantamount to an acknowledgment by us that a common carrier by water or other person subject to our jurisdiction could escape our jurisdiction by the simple device of voluntarily (albeit with pressure from a union) entering into an agreement which obligates the common carrier to take actions which may be or are in clear violation of the Shipping Act. We do not view the impact of the National Labor Relations Act as permitting a common carrier to disregard entirely its statutory obligations when conducting and resolving labor/management negotiations.[6] We find that upon consideration of the transportation factors in the situation created by these rules, including the underlying ILA-CONASA agreement, the disparity of treatment under the rules is not adequately justified.

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[6] *Local 1976, United Brotherhood of Carpenters v. Labor Board,* 357 U.S. 93 (1958); *Galveston Truck Lines v. Ada Motor Lines, Inc.,* 73 M.C.C. 617 (1957).

This is not an adoption of a "per se violation" concept. It is, rather, a simple acknowledgment by us that the record in this proceeding shows adoption and implementation of tariff rules which are unjust and unreasonable, and which are unduly and unreasonably prejudicial and disadvantageous because their effects are unjustified by transportation factors.

Additionally, on the theory that the rules at issue are lawful collective bargaining rules which are exempt from the strictures of the antitrust laws, and by extension, the requirements of the Shipping Act, Respondents have throughout this proceeding argued the Commission's lack of jurisdiction over such rules. In advancing this argument, Respondents rely heavily on the Supreme Court's decision in *Volkswagenwerk Aktiengesellschaft v. F.M.C.*, 390 U.S. 261, 19 L.Ed. 2d 1090, 88 S.Ct. 929 (1968) (Volkswagen). We find that case unpersuasive with respect to the question of this Commission's jurisdiction over the rules here at issue.[7]

In Volkswagen, the Court was confronted with a problem similar to that at issue here. In that case, the Pacific Maritime Association (PMA), an employer organization not unlike CONASA, had reached a "milestone agreement" with the International Longshoremen's and Warehousemen's Union (ILWU). By that agreement the ILWU agreed to the introduction of labor-saving devices and the elimination of restrictive work practices on the West Coast waterfront in return for PMA agreement to create a fund to mitigate the impact upon ILWU employees of the labor-saving technological inno-

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[7] We note in this regard the recent decision of the Supreme Court in *Federal Maritime Commission, et al. v. Pacific Maritime Association, et al.*, —— U.S. ——, March 1, 1978, with respect to requisite filing with and pre-implementation approval by the FMC of certain collective bargaining agreements which impose terms controlling or affecting competition upon employers who are not members of the multi-employer bargaining unit.

vations. The fund created—the so-called "Mech" fund—was to be raised and the method of its raising determined by the PMA alone.

The method used to raise this fund allegedly resulted in inequities borne by Volkswagenwerk Aktiengesellschaft, one shipper who supported the fund. It, therefore, refused to pay the assessments levied upon it with predictable loss of revenue to the fund.

Volkswagen obtained a stay of the court proceedings which followed in order to permit this Commission to exercise its jurisdiction and to determine certain issues. Those issues were:

1. whether the assessments against Volkswagen were claimed pursuant to an agreement required to be filed with the Commission pursuant to section 15 of the Shipping Act, which agreement had not been filed with or approved by the Commission;

2. whether the assessment subjected Volkswagen to undue or unreasonable prejudice or disadvantage in violation of section 16 of the Shipping Act; and

3. whether the assessment method constituted an unjust and unreasonable practice in violation of section 17 of the Shipping Act as to Volkswagen.

The Commission found against Volkswagen and dismissed the complaint. The Court of Appeals affirmed the Commission. However, thereafter the Supreme Court reversed the Court of Appeals.

A majority of the Court found that the assessment formula (as distinct from the agreement to set up the fund) was subject to the filing and approval requirements of section 15 of the Shipping Act. As such, the assessment agreement was to be filed with the Commission under that section. In the Commission's deliberations of this agreement, the Court concluded, the Commission would also have to take into consideration the

alleged violations of sections 16 and 17. Therefore, the Court did not reach the merits of the sections 16 and 17 claims, and remanded the case to the Commission for further proceedings.

In a dissent, Mr. Justice Douglas urged that "to require the funding part of maritime collective bargaining agreements to receive prior approval from the Maritime Commission . . . ." was an unwise decision. He feared that such advance approval by the Commission would "partially paralyze" collective bargaining. Additionally, Douglas stated:

> I believe the Court has misconstrued section 15 of the Shipping Act, 1916; and I fear that its erroneous construction will cause serious disruption in the process of collective bargaining in the maritime industry. If the tariff extracted from [Volkswagen] is discriminatory or unreasonable, sections 16 and 17 of the Shipping Act provide a remedy.

Mr. Justice Harlan, in his separate concurring opinion, took issue with Douglas. Harlan stated:

> . . . he [Douglas] suggests that a proper accommodation between "labor" and "competition" interests can be reached by exempting both labor agreements and labor-related agreements from the filing requirements of section 15 but leaving them subject to the specific prohibitions of the antitrust laws and sections 16 and 17 of the Shipping Act.
>
> This suggested accommodation appears to me demonstrably wrong. In the first place, as the Court notes, the filing requirement of section 15 was drafted broadly, and the filing-and-approval process includes review of questions arising under sections 16 and 17, and specifically creates an exemption from antitrust attack.

As may be seen, the Harlan position, which is used repeatedly before us in an attempt to support the antitrust exemption and the exemption from the Shipping Act of the rules involved here simply does not support that contention. Harlan's position is addressed to agreements which should receive advance approval under section 15, and concurrent sections 16 and 17 scrutiny. We have no such agreement at issue here. What we have here is merely the unilateral implementation of a rule founded in a collective bargaining agreement.

One collateral matter addressed by the Presiding Officer needs to be disposed of although it may have been rendered moot by the passage of time. In his Initial Decision, the Presiding Officer found that, while the rules at issue violate the Shipping Act and the Intercoastal Shipping Act, any hastily effected order in the nature of a cease and desist order might precipitate interference with the ocean commerce involved which may be to the detriment of the public interest. As a result, the Presiding Officer determined that in the absence of review by us or exceptions, the effective date of any order requiring cancellation of PRMSA's offending tariff rules should be deferred for three months.

While we are amenable to deferring the effective date of the cease and desist order entered herein, we believe that the three months recommended by the Presiding Officer is unjustifiably long. We believe 30 days is sufficient time to allow Respondent to order its affairs and conform its tariffs, if necessary.

THEREFORE, IT IS ORDERED, That, except to the extent noted above, the Initial Decision issued in this proceeding is hereby adopted as our own and made a part hereof; and

FURTHER, IT IS ORDERED, That, within 30 days from the date of service of this Report and Order, Puerto Rico Maritime Shipping Authority shall cancel the tariffs found unlawful herein; and

FINALLY, IT IS ORDERED, That this proceeding be discontinued.

By the Comission.

/s/ Francis C. Hurney
FRANCIS C. HURNEY
Secretary

APPENDIX G

SELECTED PORTIONS OF THE RECORD

AFFIDAVIT

COMMONWEALTH OF VIRGINIA
CITY OF CHESAPEAKE

I, Allie S. McNeil, after first being duly cautioned and sworn state the following of my own personal knowledge and belief.

I am Vice President of D. D. Jones Transfer and Warehouse Company, Inc. ("Company" or "D. D. Jones"). I have been employed in this capacity for approximately twelve years. In my capacity as Vice President I negotiate all sales contracts and participate in the overall management of the Company. I previously served as Sales Manager. I have been employed by the Company for approximately twenty-five years.

D. D. Jones was formed in 1928. The Company is engaged in the business of local drayage and general warehousing of freight. The Company has operating authority in the commercial zones of Norfolk, Chesapeake, and Portsmouth, Virginia. It also has operating authority in Virginia, North Carolina and South Carolina for the carriage of household items. D. D. Jones also operates the ramp for the piggyback operations of Norfolk and Western Railroad at its Atlantic Avenue, Chesapeake, Virginia yard and of Seaboard Coast Line Railroad at its South Street, Portsmouth, Virginia yard, and the piggyback services offered by the railroad provides for movement on railroad flat cars of intermodal containers or motor carrier trailers.

* * * *

[D]rivers must haul the containers through a maintenance and repair line and an interchange station line. At both

of these locations the container is inspected for any damage. At the interchange station a Trailer Interchange Receipt and Inspection Report is completed. An example of this report is attached as Exhibit L. It takes the driver from one to three hours to pass through these two lines. Since I.L.A. labor has historically loaded break bulk cargo in our trucks with only supervision by our employees, containerization saved D. D. Jones no additional loading and unloading costs. For movement of cargo from the seaport terminal into our warehouse, both before and after containerization, our driver simply pulled a loaded trailer from the terminal to our warehouse, where our employees unloaded the cargo. The amount of containerized cargo hauled, as well as the number of containers stripped and stuffed, is indicated in the chart attached as Exhibit M.

Enforcement of the Rules in the early 1970's adversely affected our operation. Because the I.L.A. felt that the stripping and stuffing of containers at our facilities violated the Rules, it instructed the steamship lines not to release containers which we had been ordered by our customers to pick up. I.L.A. labor would strip the containers at the pier, and the terminal operators would charge our customers for this unwanted handling. The extra fee was not part of our customer's agreement with the sea carrier to transport the cargo. D. D. Jones picked up the formerly containerized cargo in break bulk form and brought it to its warehouse where it was treated in our normal fashion.

The I.L.A.'s action caused many of our customers to cease using us as their port area agent and distribution center. Our customers simply had other trucking companies haul the containers to other facilities beyond the fifty-mile limit. Enforcement of the Rules on Containers did not provide additional stripping and stuffing work to the I.L.A. It simply forced business out of the Hampton Roads port or at least beyond the fifty-mile limit.

The service performed by D. D. Jones is directed by its customer. D. D. Jones is told what cargo to pick up or deliver, what containers to strip and what cargo to store. D. D. Jones cannot impose on its customer charges for unrequested services. Thus prior to 1970 when D. D. Jones chose for convenience to strip a container designated to a non-local consignee, its customer was not charged for this service. D. D. Jones' contract with its customer consists of the bill of lading. This contract provides:

> No carrier is bound to transport said property by any particular schedule, train, vehicle or vessel, or in any particular market or otherwise than with reasonable dispatch. (Exhibit G).

* * * *

AFFIDAVIT

COMMONWEALTH OF VIRGINIA
CITY OF CHESAPEAKE

I, Donald D. Moore, 2704 Horseshoe Drive, Chesapeake, Virginia 23322, after first having been duly sworn, state of my own personal knowledge and belief the following.

I have been Terminal Manager of the Overnite Transportation Company facility located at 2053 S. Military Highway, Chesapeake, Virginia 23320, for about one year. I have been employed by Overnite for about fifteen years. Prior to my present job, I was Terminal Manager at Bluefield, West Virginia for about two years and Assistant Terminal Manager in Cincinnati, Ohio for two years.

Overnight is a nonunion company. Overnite is a long haul, general cargo commerce carrier operating under the authority of the Interstate Commerce Act. Generally, we operate between cities in interstate commerce. In Virginia, Overnite performs no intrastate carriage from Norfolk to other points within the State, with the exception of import and export cargo. We pick up cargo at the establishment of manufacturers and other shippers within the Norfolk and surrounding area for interstate shipment. We also deliver cargo to similar local establishments originating out of the State of Virginia. We perform no local cartage service, which requires picking a cargo up from one business establishment and delivering it to another business establishment within the area. However, we pick up cargo in containers and noncontainerized break-bulk cargo from seaport terminals in the Hampton Roads area; and we deliver such cargo to inland areas outside the 50 mile radius.

* * * *

The I.L.A. Rules on Containers would have no effect on our operations regarding container cargo hauled to

the piers, because we stuff no cargo into containers within 50 miles, except break-bulk cargo hauled in the empty containers back to the piers which is stripped at the piers and thereafter handled by I.L.A. labor.

However, the Rules on Containers, if applied to import containers we strip at our terminal would prevent us from handling any 20′ containers. This would probably cost us the ability to handle the many 40′ containers covered by the same bills of lading, because the agents would not want to split the order up between various companies.

Import containers filled with cargo assigned to one consignee beyond the 50 mile limit would under no circumstances, I can imagine, be stripped at the pier and hauled by Overnite or any other carrier from the pier in break-bulk form to the consignee, if the Rules on Containers required such pier side stripping. The reason for this is that the shipper ships the container under a full container load tariff rate, which does not contemplate the additional charges it would cost to strip the container at the pier and forward it on in break-bulk form in road equipment. Therefore, if the Rules on Containers were enforced to prevent stripping of containers within 50 miles where the cargo was not warehoused for longer than 30 days, and this prevented us from stripping containers at our terminal for reloading into Overnite equipment, we would simply pick these containers up at the seaport terminals and haul them beyond the 50 miles limit to the premises of the consignee. Naturally, we would only haul such containers which could be safely hauled over the road. We would pick up and haul no 20′ containers, because they are much more unsafe due to weight and load distribution, and uneconomical due to the low volume capable of being hauled in them.

In other words, the Rules of Containers would force us to stop handling 20′ containers all together, and stop

stripping 40′ containers at Norfolk terminal. However, we would continue to haul 40′ containers at reasonable distances beyond the 50 mile limit without stripping them. Most other motor carriers would do the same. Under such circumstances, the Rules on Containers would not generate any more stripping of container work for I.L.A. labor on the piers.

The Rules on Containers would, of course, have adverse economic effect on our company, since we would be able to use less of our own equipment. In addition, this action would increase our cost of rental charges on containers. It would also cause a reduction in the number of local drivers and possibly the number of dock workers. We would also haul less total cargo, which could further reduce our work force.

Further, I saith not.

* * * *

AFFIDAVIT

COMMONWEALTH OF VIRGINIA
CITY OF NORFOLK

I, Daniel M. Thornton, Jr., business address 3616 Virginia Beach Boulevard, Norfolk, Virginia 23502, after first being sworn state of my own personal knowledge and belief the following.

I am President of Southgate Corporation doing business as Southgate Trucking and Southgate Terminal Warehouse Company. Both of these divisions of our company operate at a warehouse and truck dock establishment located at 3700 Village Avenue, Norfolk, Virginia 23502. This facility is within 50 miles of the port of Hampton Roads, Virginia. A copy of a brochure describing our current services is attached herewith as Appendix A. A copy of our brochure describing our services in approximately 1965 is attached herewith as Appendix B. A copy of a brochure describing our corporate services in approximately 1930 is attached herewith as Appendix C. At that time our warehouse operation was located on a sea pier. Our three main warehouse buildings and the sea pier are shown on the picture on page 2 of Appendix C. At that time, ships were unloaded at our pier by I.L.A. longshore labor. Our non-union employees moved the break-bulk cargo across the pier into our warehouses for storage, deconsolidation, repacking and ultimately rehauling to the consignee. On page 7 of the brochure is listed thirteen services we offered to our customers.

* * * *

Enforcement of the rules on containers adversely affected us, beginning in the early 1970s, in this way. The I.L.A. would instruct the steamship lines not to release containers we had been ordered by our customers to pick up at the seaport terminals. The I.L.A. felt that stripping and stuffing of containers at our warehouse violated the

rules. These containers were then stripped by the I.L.A. at the piers. We picked up this formerly containerized cargo in break-bulk form at the pier and brought it to our warehouse where it was treated in our normal fashion. Because the I.L.A. stripped the containers, the terminal company charged our customers extra fees, to cover the cost of I.L.A. stripping. These extra fees had not been part of the original shipping agreement between the shipper and the consignee, who had agreed to transport the cargo in containers at container rates, with the understanding that these containers would be stripped by us.

Historically in the Port of Hampton Roads, prior to this year I.L.A. labor working at the seaport terminal loaded break-bulk cargo in our trucks without the assistance of our employees. Therefore, the introduction of containerization saved our company no additional loading and unloading costs for movement of cargo from the seaport terminal into our warehouse. Both before and after containerization, our driver simply pulled a loaded trailer from the terminal to our warehouse, where our warehousemen unloaded the container or trailer.

The effect of containerization was to save our customers the cost of paying I.L.A. labor to handle the cargo in break-bulk form on the pier. When the rules on containers were enforced, our customers, who expected container cargo to be delivered to our warehouse without the expense of I.L.A. stripping and reloading into our trucks, were required to pay for this unwanted service.

This had the effect of causing our customers to cease using us as a port area agent and distribution center. To avoid these I.L.A. extra expenses, many of our customers of long standing simply had other trucking companies haul containers, both full shipper's loads and less than container loads, to someone else's warehouse and distribution center beyond the 50-mile limit. Attached hereto as Appendix D is a list of some of the import and

export commodities we lost, from customers of long standing, as a result of this effect of the rules. Therefore, the rules on containers, when enforced, did not have the affect of providing additional stripping and stuffing work to the I.L.A. at the seaport terminals. It only had the effect of forcing business away from us and beyond the 50-mile limit.

* * * *

Office - Supreme Court, U.S.
FILED
DEC 28 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-861

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*

No. 84-696

AMERICAN TRUCKING ASSOCIATIONS, INC., and TIDEWATER MOTOR TRUCK ASSOCIATION,

Petitioners,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Respondents.

No. 84-677

AMERICAN WAREHOUSEMEN'S ASSOCIATION,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC., and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Respondents.

No. 84-869

HOUFF TRANSFER, INC.,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS.

BRIEF FOR RESPONDENTS

(Additional captions and names of attorneys appear on inside front cover)

BEST AVAILABLE COPY

No. 84-691

INTERNATIONAL ASSOCIATION OF NVOCCs; FLORIDA CUSTOMS BROKERS AND FORWARDERS ASSOCIATION, INC.; TWIN EXPRESS, INC.; and INTERNATIONAL CONTAINER EXPRESS, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Respondents.

No. 84-684

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Nos. 84-861, 84-696, 84-677,
84-869, 84-691, 84-684

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO, *et al.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

In the 117 pages of their six separate petitions, ten petitioners have been unable to assert a single reason why the Court should grant certiorari in this case. They have articulated no question of law requiring Supreme Court review.[1] They concede there is no conflict among the cir-

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[1] The questions framed in the petitions run the gamut from "[w]hether the National Labor Relations Board correctly concluded" (No. 84-861) to "[w]hether the court of appeals erred" (No. 84-684) to "[d]id the Court of Appeals apply the proper legal criteria" (No. 84-696) to "[w]as the Circuit Court correct in overturning the NLRB decision?" (No. 84-677). It is difficult to see how the answer to any of these questions would add to the development or clarification of federal labor law.

cuits.[2] Although they argue that the case is important, since it involves a major industry, they can point to no significant issue of law or policy that should be decided by the highest court. They cite no decision of this Court with which the Fourth Circuit's is in conflict.[3] They invoke an unknown ground for certiorari—"the last clear chance doctrine."[4] The entire thrust of the six petitions is dissatis-

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[2] Indeed, there would appear to be complete harmony. Every jurist who has defined the work in controversy as this Court did in *NLRB* v. *Int'l Longshoremen's Ass'n*, 447 U.S. 490 (1980), arrived at the same conclusion reached by the court of appeals below. *See Intercontinental Container Transport Corp.* v. *New York Shipping Ass'n*, 426 F.2d 884 (2d Cir. 1970); *Int'l Longshoremen's Ass'n (Consol. Express, Inc.)*, 221 N.L.R.B. 956, 979 (1975) (ALJ Arnold Ordman); *Int'l Longshoremen's Ass'n* v. *NLRB*, 537 F.2d 706, 712-14 (2d Cir. 1976) (Feinberg, J. dissenting), *cert. denied*, 429 U.S. 1041, *reh'g denied*, 430 U.S. 911 (1977); *Humphrey* v. *Int'l Longshoremen's Ass'n*, 401 F. Supp. 1401 (E.D. Va. 1975) (Merhige, J.), *rev'd*, 548 F.2d 494, 500-01 (4th Cir. 1977) (Craven, J. dissenting); *Consol. Express, Inc.* v. *New York Shipping Ass'n*, 452 F. Supp. 1024, 1040 n.14 (D.N.J. 1977) (Stern, J.), *modified on other grounds*, 602 F.2d 494 (3d Cir. 1979), *vacated and remanded*, 448 U.S. 902 (1980), *on remand* 641 F.2d 90 (3d Cir.), *mandamus and prohibition denied*, 451 U.S. 905 (1981); *Int'l Longshoremen's Ass'n* v. *NLRB*, 613 F.2d 890 (D.C. Cir. 1979), *aff'd*, 447 U.S. 490 (1980).

[3] The only conflict which the petition on behalf of the National Labor Relations Board (No. 84-861 Petition at 29) can conjure up is not with a decision of this Court but only with a "rationale." Certiorari may be appropriate if a conflict exists with a decision. Sup. Ct. R. 17.1(c). No authority, however, sanctions Supreme Court review for only a disagreement in rationale. Moreover, there is no conflict. The "rationale" to which the petitioner alludes is not that of this Court but of one of the litigants in an earlier case. The petition manufactures the putative rationale by extracting a single word, "eliminated," used by the Court to describe the contention raised by a party. *NLRB* v. *Int'l Longshoremen's Ass'n*, 447 U.S. 490, 510-11 (1980).

[4] Two petitions (No. 84-696 Petition at 22; No. 84-861 Petition at 22-23, 29-30) contend that this case will probably represent the last opportunity for this Court to review the Rules on Containers. These petitioners seem to be under the misimpression that the Supreme Court is now a standing tribunal to pass on this single

(footnote continued on following page)

faction with the result below. They ask the Court to eschew its proper function and to sit simply as another layer in the appellate process.

This Court has already established the legal principles that govern the decision in this case. *NLRB* v. *International Longshoremen's Association*, 447 U.S. 490 (1980). The Court of Appeals for the Fourth Circuit easily applied them to correct a patent error of law in the decision of the National Labor Relations Board. This Court had directed the Board to decide whether the work retained by the Rules, *i.e.*, the stuffing and stripping of carriers' containers at the piers, is the historical and functional equivalent of traditional longshore work. 447 U.S. at 507. The Board, affirming its administrative law judge, found that it is and so held that the Rules on Containers are lawful work preservation provisions (Petitioners' Appendix at 53a, 59a, 119a). The court of appeals affirmed (Petitioners' Appendix at 24a). This Court had directed the Board to decide whether the longshoremen's employers had the right to assign this work to them. The Board, again affirming its administrative law judge, found that the longshoremen's employers do have the right of control (Petitioners' Appendix at 51a-52a). Once more, the court of appeals affirmed (Petitioners' Appendix at 24a).[5]

(footnote continued from previous page)

collective bargaining agreement. Moreover, the Court in another context recently refused to credit the hobgoblin of a last chance attitude. *See United States* v. *Stauffer Chemical Co.*, —— U.S. ——, 104 S. Ct. 575, 78 L. Ed.2d 388, 395 n.6 (1984) (No. 82-1448). Petitioners in this case would have been well-advised to heed the Court's instruction that there is no need to "seek certiorari from adverse decisions when such action would otherwise be unwarranted" merely out of fear that no future opportunity will arise, especially since the Court let it be known that it would not alter its "practice of waiting for conflicts to develop before granting the government's petitions for certiorari." 78 L.Ed.2d at 395 n.6.

[5] Some of the petitioners urge that the ALJ, the Board and the court of appeals were all wrong in finding right of control (No.

(footnote continued on following page)

Having completed the task assigned by this court, the Board then wandered into a manifest error of law. Despite its holding that the Rules retain for longshoremen the functional and historical equivalent of their traditional work, the Board concluded that these same Rules were unlawful when applied to containers destined for short-stopping or warehousing (Petitioners' Appendix at 59a-60a). The Board predicated this determination upon the theory that an agreement to retain work that has been eliminated is unlawful. It attempted to lend credibility to this theory by affixing the label "work acquisition" to the challenged agreement, despite the absence of any factual finding that off-pier work functions were or could be transferred to the longshoremen.[6]

The court of appeals had no difficulty disposing of the Board's error. It applied longstanding and well-settled principles of federal labor law which leave no doubt that an agreement to retain work that technological change has

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84-691 Petition at 13-24; No. 84-696 Petition at 17-21). They claim that these tribunals should have taken into account the proscriptions of federal shipping law in determining the legality of the Rules under federal labor law. The approach suggested would require the NLRB to decide difficult questions arising under the shipping statutes which the Federal Maritime Commission, the agency to which Congress has entrusted this task, has not yet resolved. The legality of the Rules under federal shipping law is presently before the FMC. *See 50 Mile Container Rules*, FMC No. 81-11. These shipping law questions are hardly ripe for review by this Court.

[6] Some of the petitioners seek to supply the missing factual finding by constructing scenarios in which off-pier work might be lost (No. 84-861 Petition at 27-28; No. 84-869 Petition at 15; No. 84-696 Petition at 12; No. 84-684 Petition at 10 n.7). None of these hypothetical occurrences is alleged to have happened in fact. None was invoked by the Board as a basis for its decision. None is a necessary consequence of the Rules but comes about only as a result of the choice of off-pier employers.

eliminated as a necessary function is perfectly permissible primary activity (Petitioners' Appendix at 26a-29a).[7]

The plea for a "definitive resolution of the validity of the Rules" (No. 84-861 Petition at 28) is disingenuous. The Fourth Circuit's decision is definitive.[8] It brings the verdict on the Rules into congruence with the law enacted by Congress and elucidated by this Court. It puts to rest all uncertainties concerning the validity of the Rules and thus achieves the labor stability which the Board purportedly espouses. It is the Board which would prolong the discord, not to seek a definitive resolution but a favorable one.[9]

Litigation over the Rules on Containers over the past 15 years since their adoption has consumed an inordinate amount of judicial and administrative resources. It has

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[7] The bulk of every petition is devoted to an attempt to reargue the merits of the case before the Fourth Circuit. This is inappropriate in an application for a writ of certiorari and, accordingly, this brief will not respond in kind. However, respondents are appending their reply brief below, should the Court wish to know their position on the merits.

[8] The decision of a United States court of appeals is definitive, notwithstanding the Board's refusal to admit it. The NLRB makes no bones about its policy of disregarding decisions of federal appellate courts with which it is displeased. Although this policy has been strongly criticized by ten circuits, the Board persists. Its refusal to abide by the decision in this case, pending application to this Court, prompted respondents to petition for writs of mandamus and prohibition to compel the Board to comply by discontinuing further litigation it had initiated against the Rules in derogation of the decision of the court of appeals. *In re Int'l Longshoremen's Ass'n*, No. 84-1973 (4th Cir. filed Sept. 14, 1984).

[9] Inexplicably, the Board has indicated its intent (No. 84-861 Petition at 22 n.8) not to oppose the petitions which seek review of that portion of the decision below which sustained the validity of the Rules, where a unanimous court affirmed a unanimous Board in affirming its administrative law judge. With that kind of unanimity, one would think that those issues at least have been definitively adjudicated. It is difficult to reconcile the Board's willingness to reopen these issues with its goal of certainty and stability.

generated 13 circuit court, 14 district court and 10 NLRB proceedings, as well as two determinations on the merits by this Court. The decision of the court of appeals below has brought the wheel full circle. The status of the Rules on Containers is precisely where it was after the first ALJ found them to be lawful work preservation provisions almost a decade ago. *International Longshoremen's Association (Consolidated Express, Inc.)*, 221 N.L.R.B. 956, 979 (1975) (ALJ Arnold Ordman). The time has come to say "Enough!" The pique of disappointed litigants is no basis to add another unnecessary chapter. There is no reason for Supreme Court review. The petitions should be denied.

Dated: New York, New York
December 27, 1984

Respectfully submitted,

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ADDENDUM

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 83-1185(L)

AMERICAN TRUCKING ASSOCIATIONS, INC. and TIDEWATER MOTOR TRUCK ASSOCIATION,

Petitioners,

and

HOUFF TRANSFER, INC., AMERICAN WAREHOUSEMEN'S ASSOCIATION and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenors,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Intervenors.

No. 83-1214

INTERNATIONAL ASSOCIATION OF NVOCCS, FLORIDA CUSTOMS BROKERS AND FORWARDERS ASSOCIATION, INC., TWIN EXPRESS, INC., and INTERNATIONAL CONTAINER EXPRESS, INC.,

Petitioners,

and

SAN JUAN FREIGHT FORWARDERS, INC.,

Intervenor,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 83-1424

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, HAMPTON ROADS DISTRICT COUNCIL; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ATLANTIC COAST DISTRICT COUNCIL; INTERNATIONAL LONGSHOREMEN'S DISTRICT COUNCIL BALTIMORE, MARYLAND; ILA LOCALS 333, 846, 862, 921, 953, 970, 1248, 1355, 1416, 1416A, 1429, 1458, 1526, 1526A, 1624, 1680, 1736, 1783, 1784, 1819, 1840, 1922, and 1970, AFL-CIO; HAMPTON ROADS SHIPPING ASSOCIATION; SOUTHEAST FLORIDA EMPLOYERS PORT ASSOCIATION; COORDINATED CARIBBEAN TRANSPORT, INC.; CHESTER BLACKBURN & RODER, INC.; EAGLE, INC.; ELLER & COMPANY, INC.; STRACHEN SHIPPING COMPANY; and MARINE TERMINALS, INC.,

Respondents.

SHIPPING GROUP'S REPLY BRIEF

No. 83-1486

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Petitioners,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

HOUFF TRANSFER, INC., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, TIDEWATER MOTOR TRUCK ASSOCIATION, and AMERICAN TRUCKING ASSOCIATIONS, INC.,

Intervenors.

ON PETITIONS TO REVIEW AND ON APPLICATIONS TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

SHIPPING GROUP'S REPLY BRIEF

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United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 83-1185(L)

AMERICAN TRUCKING ASSOCIATIONS, INC., and TIDEWATER MOTOR TRUCK ASSOCIATION,

Petitioners,

and

HOUFF TRANSFER, INC., AMERICAN WAREHOUSEMEN'S ASSOCIATION and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenors,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Intervenors.

ON PETITIONS TO REVIEW AND ON APPLICATIONS TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

SHIPPING GROUP'S REPLY BRIEF

As to the Trucking Group:

The NLRB's and Shipping Group's principal briefs leave no doubt that the Rules on Containers are lawful work preservation provisions on their face. These briefs dispose of the contentions advanced by the Trucking Group.

The work preservation argument that the Trucking Group urges depends upon the existence of a "new intermodal transportation system" into which it claims that the work of stuffing and stripping the longshore employers' containers has been inseparably integrated (Trucking Group's Brief ("TGB") at 12-31). Both the ALJ and the

Board found otherwise (Bd at 16 (A. 163); ALJ at 31-37 (A. 44-50)). Their factual determinations are supported by an abundance of record evidence (A. 254, 258, 266-67, 322, 342-43, 351-52, 383-89, 426-28, 432-33, 452-54, 469-71, 545, 598-99). Moreover, the Trucking Group's argument has already been rejected by the District of Columbia Circuit. *International Longshoremen's Association* v. *NLRB ("ILA")*, 198 U.S. App. D.C. 157, 613 F.2d 890, 909-10 & n.173 (1979), *aff'd*, 447 U.S. 490 (1980). The Trucking Group's obstinate adherence to its discredited theory is futile.

The Trucking Group's right of control argument rests upon two fictions. First, it claims that the Board never considered the right of control issue (TGB at 32-37)—an untenable contention in light of the ALJ's careful analysis (ALJ at 58-60, 75 (A. 71-73, 88)), which was adopted by the Board (Bd at 18 n.30 (A. 165)). Second, the Trucking Group's invocation of contractual common-carrier obligations (TGB at 37-45) would require the NLRB to determine the validity of the Rules on Containers under federal shipping law—an endeavor the Federal Maritime Commission has not yet been able to complete to the satisfaction of an appellate court.[1] The Board correctly declined to trespass upon an area beyond its jurisdiction, *Local 1976, Carpenters* v. *NLRB ("Sand Door")*, 357 U.S. 93, 110-11 (1958), and rightfully branded any linkage of the outcome of this labor law case to the uncertainties of pending FMC litigation "mischievous." (ALJ at 72 (A. 85)).

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[1] *Sea-Land Service, Inc.—Proposed Rules on Containers*, 21 F.M.C. 1 (1978), *aff'd in part and remanded in part sub nom. Council of North Atlantic Shipping Associations* v. *FMC*, 217 U.S. App. D.C. 318, 672 F.2d 171, *cert. denied*, 103 S. Ct. 69 (1982), *on remand* Nos. 73-17 & 74-40 (FMC May 19, 1982), *vacated and remanded*, No. 78-1776, Supplemental Opinion Following Remand (D.C. Cir. July 2, 1982), *reh'g en banc denied*, No. 78-1776 (D.C. Cir. Sept. 23, 1982).

As to the NLRB:

The only real issue in this case is the legal soundness of the Board's trucking and warehouse rulings. The NLRB's brief ("NB") leaves no doubt that this issue is purely one of law (NB at 50-54).

1. *The Board's Decision*

The Board's ruling invalidated application of the Rules to certain trucking and warehouse operations purportedly because it was work acquisition (Bd at 26-27 (A. 173-74)). The Shipping Group's Brief ("SGB") showed that the conclusion of work acquisition was a mere assumption unsupported by any finding of fact or record evidence (SGB at 42-49). Indeed, the Shipping Group demonstrated that the stripping/stuffing of containers at the piers can in no way lessen the work performed by trucking or warehouse employees at off-pier sites (SGB at 42-46). Since, without work loss, there can be no acquisition, the Shipping Group exposed the Board's finding of illegality as one predicated solely on its conclusion that longshore work has been "eliminated." (SGB at 47-48).

The Board's brief to this court concedes the correctness of the Shipping Group's analysis. The NLRB has now abandoned any pretense of work acquisition. The word "acquisition" appears four times in the 64 pages of the Board's brief (NB at 23, 39, 49), but only once in connection with the Board's decision in this case (NB at 49). Even here, it is not given its ordinary meaning. It is dressed up in quotation marks, suggesting that the Board in its decision did not mean that longshoremen were in fact acquiring work in the real world but, rather, used the term "acquisition" as a technical catchword to denote unlawful activity.

Just as in the Board's and ALJ's decisions work acquisition is an assumption, not a finding of fact, so too

in the Board's brief to this court. There is not a single citation in that brief to any record evidence in support of a factual finding that application of the Rules to truckers and warehousemen caused longshoremen to acquire the off-pier employees' work. If work acquisition had really been a factual determination in its decision, one would expect the Board to point to those portions of the record that support its finding. After having received the Shipping Group's brief, which openly challenges any claim that off-pier work is being acquired, surely the Board's brief would have responded by supplying the missing evidentiary support. It does not because none exists. Instead, the Board jettisons "work acquisition" as a necessary element and now seeks to persuade this court that work "elimination" alone suffices to overcome the Board's own determination that the Rules are generally valid work preservation provisions.

The Board's brief confirms the Shipping Group's demonstration that the decision under review is predicated on the principle of law that eliminated work may not be the subject of a lawful work preservation agreement. The Board's brief states that "agreements to cease doing business in connection with claiming work that technology has eliminated are not primary agreements." (NB at 52). This is an error of law.

The Board cites no authority in support of its theory because neither the NLRB itself nor any judicial tribunal has ever endorsed it. The controlling authorities have consistently upheld agreements to preserve or reacquire eliminated work. *National Woodwork Manufacturers Association* v. *NLRB,* 386 U.S. 612 (1967), *aff'g in part and rev'g in part* 354 F.2d 594 (7th Cir. 1966); *American Boiler Manufacturers Association* v. *NLRB,* 404 F.2d 547 (8th Cir. 1968), *cert. denied,* 398 U.S. 960 (1970); *Meat Drivers*

Local 710 v. *NLRB*, 118 U.S. App. D.C. 287, 335 F.2d 709 (1964).

2. *The Board's Brief*

The Board's decision in this case rests upon the naked assertion that the attempt to preserve eliminated work is illegal work acquisition (Bd at 27 (A. 174)). In an effort to rescue this implausible postulate, the Board's counsel goes to even more extreme lengths, which, rather than salvage the Board's decision, actually underscore its fundamental infirmities. The Board's counsel conjures up something old and something new. He introduces a distinction never before voiced and dredges up an old discredited theory. Neither of these appear in the Board's decision.[2]

First, the Board's brief attempts to undermine the well-established law of work preservation by introducing a spurious distinction never before drawn either in the decision on review or in any prior case. The Board's counsel claims that the legality of the agreement turns on whether the work has been "eliminated" or "diverted." (NB at 52). This semantic game is devoid of legal significance.[3] From the point of view of the workers, it matters not whether the work has been transferred to another work site or gone to the Valhalla of the victims of tech-

[2] These *post hoc* rationalizations by agency counsel are unacceptable to support the decision on review. *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 397 (1974); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-69 (1962); *Edward J. DeBartolo Corp.* v. *NLRB*, 662 F.2d 264, 271-72 n.6 (4th Cir. 1981). An appellate court must adjudge an administrative decision on the basis of the reasons articulated in the agency's decision itself. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *Austin* v. *Jackson*, 353 F.2d 910, 912 (4th Cir. 1965).

[3] Board counsel's distinction is logically distorted. Manifestly, attempts to reinstate "diverted" work require a greater involvement of third parties than the resuscitation of "eliminated" work. Both are lawful work preservation, but the former is nearer the dividing line between primary and secondary activity.

nology. In either case, their work is lost, and the workers' efforts to compel their employer to return it are primary.

The controlling cases simply do not bear out Board counsel's attempted distinction. The Supreme Court in *National Woodwork* did not speak in terms of "diverted" or "displaced" work, but rather "employers' efforts to *abolish* . . . jobs." 386 U.S. at 640 (emphasis added). So too, the Eight Circuit in *American Boiler* and the District of Columbia Circuit in *Meat Drivers* sanctioned the recovery of *"lost"* work. 404 F.2d at 554; 335 F.2d at 712 (emphasis added). Moreover, the facts in these cases reveal that the work in controversy had been eliminated, not merely diverted. In *National Woodwork,* the work of cutting and fitting blank doors had been integrated into the manufacturing process. There were no carpenters at the manufacturers' plants to whom the work was diverted. The machines produced doors already fitted to their jambs. The work of mortising, routing and beveling had been eliminated by the prefabrication technology. The prepackaged boilers in *American Boiler* had the same work elimination effect. The manufacturing process had abolished, not diverted, the plumbers' on-site trimming work.

In *Meat Drivers,* the work of distributing meat products within the 50-mile Chicago area from a metropolitan processing plant had been eliminated by the establishment of a suburban plant. Distribution from the city plant was no longer a necessary step in the process of getting the meat from the suburban plant to the Chicago customers. The court of appeals upheld an agreement requiring the employer to have the meat transported first to the city plant thence to the customers by its employees at that plant rather than directly from the suburban plant to the customers by independent over-the-road truckers retained by the employer. *Meat Drivers* is particularly instructive

because it demolishes the Board's attempt in this case to introduce "duplication" as a disqualifying factor (Bd at 26-27 (A. 173-74)). Obviously, delivery directly from the suburban plant was a more economical, convenient and efficient practice. Transfer to the city plant was a duplicative, make-work step. Nevertheless, the city employees' insistence that it be done to reintroduce their lost work was lawful, primary activity, even though it had the effect of disrupting the employer's arrangements with the over-the-road contractors.[4]

Second, the Board's brief reaches back to an earlier era to urge that it is the "cease doing business" factor which makes the attempt to preserve eliminated work unlawful (NB at 53 and n.43). The case cited for this proposition, *Painters & Paperhangers Local 27 (Glaziers) (Joliet Contractors Association)*, 99 N.L.R.B. 1391 (1952), *aff'd sub nom. Joliet Contractors Association* v. *NLRB*, 202 F.2d 606 (7th Cir.), *cert. denied*, 346 U.S. 824 (1953), was decided not only prior to *National Woodwork* but also before the 1959 amendments to § 8(b)(4) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 158(b)(4) (1976), which introduced the proviso "that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."[5]

Prior to the enactment of the primary proviso, it was tenable to suggest that a violation could be predicated on a mere cessation of business. Indeed, the Seventh Circuit in reviewing *Glaziers* said "we are not convinced that

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[4] The Board itself reached a similar result in *Plumbers Local 636 (Mechanical Contractors Ass'n)*, 189 N.L.R.B. 661 (1971) where a duplicative practice of disassembling and repiping prefabricated units was upheld as valid work preservation.

[5] The courts extended this primary proviso to agreements challenged under LMRA § 8(e), 29 U.S.C. § 158(e) (1976). *See National Woodwork*, 386 U.S. at 634-43.

a Union violation . . . is dependent upon whether its activities are primary or secondary." 202 F.2d at 610. Once Congress passed the proviso, however, *Glaziers* lost all precedential value, and a different mode of analysis was mandated.[6]

Under the present state of the law, three elements are necessary to establish a violation of LMRA § 8(b)(4) or § 8(e): (1) inducement (threats or coercion), (2) cessation of business, and (3) secondary objective. While it is still necessary to find a cessation of business, that element is no longer determinative. It must be shown that the cessation is a result of secondary, not primary, activity. The primary/secondary analysis is the crucial touchstone, and it is totally independent of the cessation of business element. The primary/secondary determination turns upon the motivation for the cessation. Where the cessation is the result of primary activity, no violation occurs. Thus, the Supreme Court has repeatedly held that the effect on third parties, *i.e.*, the cessation of business, "no matter how severe, is irrelevant to the validity of the agreement so long as the union had no forbidden secondary purpose to affect the employment relations of the neutral." *ILA*, 447 U.S. at 507 n.22, *citing NLRB* v. *Enterprise Association of Steam, etc. Pipefitters*, 429 U.S. 507, 510, 526 (1977); *see also National Woodwork*, 386 U.S. at 627.[7]

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[6] In its later determination in *National Woodwork*, the Seventh Circuit itself recognized the obsolescence of its prior affirmance of *Glaziers*. 354 F.2d at 598.

[7] This same analysis has been articulated by the Supreme Court:

> Under § 8(b)(4)(B) of the National Labor Relations Act, 29 USC § 158(b)(4)(B), a union commits an unfair labor practice when it induces employees to refuse to handle particular goods or products or coerces any person engaged in commerce, where 'an object' of the inducement or coercion is to require any person to cease doing business with any other person. A proviso, added to § 8(b)(4)(B) in 1959, declares that the section 'shall [not] be construed to make

(Footnote Continued on Succeeding Page)

The theory now proposed by the Board's counsel, which makes the cessation of business the crucial factor, would in effect repeal the primary proviso. Since even the most pristine primary work preservation agreement has some effect on third parties, which, as the Board reminds us, is sufficient to make out a cessation of business (NB at 29 n.26, *citing NLRB* v. *Local 825, Operating Engineers,* 400 U.S. 297 (1971)), virtually every work preservation agreement would be vitiated if Board counsel's view were to prevail.[8]

Board counsel's attempts to buttress the decision under review are unavailing. His diversion/elimination distinction and "cessation of business" theory are contrary to well-established precedent and to the express provisions of the statute. However, they serve one useful purpose. They betray a recognition that the Board's decision as ren-

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> unlawful, where not otherwise unlawful, any primary strike or primary picketing.' Although without the proviso the section on its face would seem to cover any coercion aimed at forcing a cessation of business, the National Labor Relations Board (Board) and the judiciary have construed the statute more narrowly, both before and after the proviso was added, to prohibit only secondary, rather than primary, strikes and picketing.
>
> Among other things, it is not necessarily a violation of § 8(b)(4)(B) for a union to picket its employer for the purpose of preserving work traditionally performed by union members even though in order to comply with the union's demand the employer would have to cease doing business with another employer.

Pipefitters, 429 U.S. at 509-10 (footnotes and citation omitted).

[8] The change in business practices which would constitute the "cessation of business" element of the Board's trucking and warehouse rulings in this case is minimal. It consists of the delivery of cargo to off-pier sites in a truck rather than a steamship carrier container. To the off-pier employees the vehicle in which the cargo is transported makes no difference. Their work is the same in either case. The change in business practices is so slight and insubstantial as to place in doubt whether the "cessation of business" element has in fact been established. *See Operating Engineers, supra,* 400 U.S. at 305. If the alleged "cessation" in this case suffices, what work preservation agreement could survive?

dered needs shoring. The fact that the best support Board counsel was able to devise is insufficient shows that the decision is indefensible.

3. *The Controlling Law*

The Board's trucking and warehouse rulings are unable to withstand scrutiny under the basic principles of the work preservation doctrine. In this case, however, there is a more definitive standard—the Supreme Court's decision in *ILA*, which dealt with this very litigation. The Board's rulings part company with *ILA* in every respect. The *ILA* Court admonished the Board for erroneously focusing "on the work done by the employees of the charging parties, the truckers and consolidators, after the introduction of containerized shipping." *Id.* at 507.[9] In its trucking and warehouse rulings, the Board continues to define the work in dispute as the post-containerization work performed by the trucking and warehouse employees (Bd at 24 (A. 171)).[10]

The *ILA* Court required the Board to focus on the longshoremen's work prior to the innovation and to evaluate the

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[9] Neither the Supreme Court nor the District of Columbia Circuit in *ILA* nor any other tribunal which has addressed this case has ever made any distinction between application of the Rules to consolidators and their application to truckers and warehousemen. The reason is self-evident. The traditional work of longshoremen and the on-pier work the Rules seek to retain are the same whether the container comes from/goes to a consolidator, NVO, trucker or warehouseman. Regardless of the off-pier entity, the longshoremen perform the same work. The test in each instance remains the same: whether that work is historically and functionally related to traditional longshore work, and the Board has answered that question in the affirmative.

[10] Even if the Board's "elimination" theory were not legally erroneous, it would still be reversible error for the Board to apply that theory in this case. The Board disregards the Supreme Court's direction. It views the Rules on Containers in hindsight. While it is true that containerization had the potential for eliminating longshore work, this elimination with respect to warehousing and shortstopping had not occurred at the time that the Rules were adopted in 1969. From the inception of containerization un-

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functional and historical relationship between this traditional longshore work and the work retained by the Rules. 447 U.S. at 507, 509-10. In its trucking and warehouse rulings, although it had already found that the work the Rules propose to preserve is functionally and historically related to traditional longshore work and has not been integrated into off-pier work practices (Bd at 16, 24-27 (A. 163, 171-74); *see also* NB at 34-37), the Board simply eschewed these critical findings and embarked upon its "elimination" theory.

The Board's theory cannot be reconciled with *ILA*. The Supreme Court recognized that the need for longshore work had been eliminated by containerization, 447 U.S. at 509, but did not consider this elimination to be a determinative factor. The Court mandated a further inquiry:

> whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere.

447 U.S. at 510 (footnote omitted). The Court thus zeroed in on the key factor for determining a violation of §§ 8(b)(4) and 8(e): whether the challenged agreement has a primary or secondary objective—an inquiry the Board

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til the 1973 Dublin Supplement, containers destined for stripping at local warehouses and trucking stations were routinely stripped at the piers (A. 1082-83, 1085-86, 1159-60, 1181). In the Dublin Supplement, the longshoremen agreed not to strip warehouse-bound containers but only on the condition that their contents be genuinely warehoused for the customary 30-day period. It was to preserve this work from elimination that the Rules were adopted. Any elimination that may have occurred thereafter resulted from 10 years of injunctions, not from "the technology, as the ILA agreed to have it operate." (NB at 49). Thus, the "elimination" upon which the Board's theory depends did not exist at the time the agreement was adopted, the temporal context in which, under the Supreme Court's decision, the Rules must be adjudged.

completely loses sight of in concocting its elimination theory.

The Supreme Court has repeatedly said that the "touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." *National Woodwork,* 386 U.S. at 645 (footnote omitted); *Pipefitters,* 429 U.S. at 511; *ILA,* 447 U.S. at 504. The Board had no difficulty finding that the agreement to have longshoremen stuff and strip their own employers' containers at their own employers' premises "had an overall work preservation objective." (Bd at 25 (A. 172)). The touchstone, therefore, was completely satisfied. In its trucking and warehouse rulings, the Board does not mention the touchstone. It offers no explanation how the longshoremen's "valid work preservation objective" becomes secondary when their agreement is applied to warehousemen and truckers. The fact that in those instances the Board believes the work has been "eliminated" in no way changes the primary nature of the agreement. The longshoremen are still bargaining with their own employers to have them revive the lost work. If, as the Board suggests, the work has in fact been eliminated, no other employees can be doing it. The longshoremen's agreement, then, cannot be "tactically calculated to satisfy union objectives elsewhere." *National Woodwork,* 386 U.S. at 644. Nothing can be more primary than an agreement to preserve "eliminated" work.

The only way such an agreement could become secondary would be if its application reached out to acquire other employees' work not previously performed by the contracting employees. *National Woodwork,* 386 U.S. at 630-31 and at 648 (Harlan, J. concurring). In this case, unlawful acquisition could occur only if the longshoremen's work had become inseparably integrated into the work of the off-pier employees—which the Board in this case found not to be the fact (Bd at 16, 24-27 (A. 163, 171-74); ALJ

at 31-37 (A. 44-50)).[11] The Board's decision did not find, nor does the Board's brief claim, that any off-pier work is being transferred to the docks by application of the Rules. *See* pp. 3-4 *supra*. The invocation of "elimination" does not supply the necessary secondary element.

The Board recognizes that acquisition is necessary. The bottom line of its decision is, "Therefore, we conclude that the Rules on Containers as applied to shortstopping and traditional warehousing practices have an illegal work acquisition objective." (Bd at 27 (A. 174)). However, in the light of its own factual findings, the Board cannot say that the work of off-pier employees is being acquired. Rather, it attempts to justify its decision by labelling as "acquisition" the attempt to retain "work that the technology, as the ILA agreed to have it operate, 'eliminated the need for.'" (NB at 49). This "eliminated" work is longshore work, not off-pier work. Unlawful acquisition occurs only when the work acquired is someone else's. Only then is it secondary. Acquiring one's own work is quintessentially primary. Indeed, it is not acquisition at all. It is work preservation.

The Board attempts to stigmatize this perfectly lawful conduct by expanding the term "acquisition" to include that which it has never meant in a manner that obliterates the distinction between primary and secondary. The Board appeals to this court to defer to the Board's discretion (NB at 51, 53). But judicial deference is neither absolute nor blind. *NLRB* v. *Brown*, 380 U.S. at 278, 292 (1965); *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). It does not include sanctioning an Orwellian perversion of the plain meaning of the language which, if unchecked, would abolish the doctrine of work preservation.

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[11] The opponents of the Rules have always recognized the need for integration to invalidate the Rules. They have always predicated their challenge on the contention, albeit fallacious, that longshore work has been inseparably integrated into the "new intermodal transportation system." *See, e.g.*, TGB at 17.

CONCLUSION

For the foregoing reasons and those set forth in the Shipping Group's Principal Brief, the Board's trucking and warehouse rulings should be reversed, the applications for enforcement in Nos. 83-1424 and 83-1486 denied, and the Rules on Containers declared lawful work preservation agreements in their entirety.

Dated: New York, New York
October 17, 1983

Respectfully submitted,

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Nos. 84-677, 84-684, 84-691, 84-696, and 84-869

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In the Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN WAREHOUSEMEN'S ASSOCIATION, PETITIONER
v.
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, PETITIONER
v.
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

INTERNATIONAL ASSOCIATION OF NVOCCs, ET AL., PETITIONERS
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., PETITIONERS
v.
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

HOUFF TRANSFER, INC., PETITIONER
v.
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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BEST AVAILABLE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-677

AMERICAN WAREHOUSEMEN'S ASSOCIATION, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

No. 84-684

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

No. 84-691

INTERNATIONAL ASSOCIATION OF NVOCCs, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

No. 84-696

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., PETITIONERS

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

No. 84-869

HOUFF TRANSFER, INC., PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

We have set forth the background of these cases in our petition in No. 84-861, *NLRB* v. *ILA*, which seeks review

of the same judgment of the court of appeals that is challenged by petitioners. These cases concern the Rules on Containers, which are part of collective bargaining agreements between the International Longshoremen's Association and shipping industry employers. The Rules are designed to deal with the effects of containerization on longshoremen's work. In *NLRB* v. *ILA (ILA I)*, 447 U.S. 490 (1980), this Court vacated two decisions of the National Labor Relations Board that had concluded that the Rules on Containers and their enforcement constitute secondary activity prohibited by Sections 8(b)(4) and 8(e) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(b)(4) and (e). On remand, the Board consolidated those two proceedings with seven other proceedings concerning the Rules on Containers. The Board concluded that the Rules violate the NLRA in their applications to a practice known as shortstopping and to certain traditional warehousing practices. The Board also concluded that the Rules are otherwise lawful. The court of appeals, disagreeing with the Board in part, held that the Rules are lawful in all respects. 734 F.2d 966; Pet. App. 40a-64a.[1]

In No. 84-861, we seek review of the court of appeals' decision insofar as it overturned the Board's ruling. Petitioners in Nos. 84-869 and 84-684 also seek review of this aspect of the court of appeals' decision. Petitioners in Nos. 84-677, 84-691, and 84-696 contend that the Rules violate the National Labor Relations Act in all their applications.

As we explain in our petition, the aspect of the court of appeals' decision that we challenge is inconsistent with the principles of this Court's decision in *ILA I*. See 84-861 Pet. 23-28. But as we also stated in our petition (84-861 Pet. 22,

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[1] "Pet. App." refers to the appendix filed jointly by petitioners in Nos. 84-677, 84-684, 84-691, and 84-696.

28) — and as this Court noted in *ILA I* (447 U.S. at 493; see *id.* at 494-496) — the legality of the Rules in all their applications is a question of great practical significance. The Rules are in effect in every major Atlantic and Gulf port. The Rules determine the extent to which shippers can take advantage of the potentially enormous savings made possible by the growth of containerization, and their enforcement will significantly affect the operation of the land-sea transportation system, the cost of that transportation to shippers and consumers, and the jobs of many of those employed in the industry. Moreover, controversies over the treatment of containers have been a frequent cause of industrial strife in the shipping industry; a definitive resolution of the validity of the Rules will promote stability in the collective bargaining process in the shipping industry. Accordingly, it would be appropriate for the Court to consider the legality of the Rules in their entirety rather than considering only particular applications of the Rules.

It is therefore respectfully submitted that the petitions for a writ of certiorari should be granted.

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JANUARY 1985

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